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FEDERAL COMMUNICATIONS COMMISSION

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FCC 74-383

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
PETITIONS FOR WAIVER RECONSIDERATION OR DECLARATORY RULINGS WITH REGARD TO AFFILIATION WITH AMERICAN BROADCASTING COS., INC., "FOUR SPECIALIZED AMERICAN RADIO NETWORKS"

MEMORANDUM OPINION AND ORDER

(Adopted April 10, 1974; Released May 6, 1974)

BY THE COMMISSION:

1. The Commission here considers a number of letters and petitions requesting waivers (or reconsideration of previously denied waiver requests) of the Commission policy which limits the number of affiliates which a radio network company may have in a Standard Metropolitan Statistical Area (SMSA) or a single community if located outside an SMSA. This limitation, which is applied to the multiple network operations of both American Broadcasting Companies, Inc. (ABC) and Mutual Broadcasting System (Mutual) was first stated with regard to ABC's operations in 1969.[1] ABC had previously established "four new specialized American Radio Networks" and had asked the Commission for an interpretive ruling that § 73.137 of the Rules (barring dual network operations) was inapplicable to the ABC proposal. In its Order the Commission refused to make the requested interpretive ruling, but gave encouragement to the non-simultaneous operation of this new multiple-network operation.[2] Upon a petition for reconsideration filed by Mutual, the Commission, in denying the Mutual petition, set forth the policy restriction in footnote 1 above. Several petitions for reconsideration or similar relief were filed by licensees who were subject to the disaffiliation requirement contained in the above-quoted language, and the Commission has since that time received a number of additional requests, either from licensees which have not had a previous ABC affiliation or where other changed circumstances would require disaffiliation under the policy.

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[1] *Mutual Broadcasting System, Inc.* 17 FCC 2d 509, 514 (May 1969), par. 25: "Since the news and commentary programs for all ABC networks originate from one company, we cannot find it in the public interest to have all, or nearly all, of the stations in a market affiliated with commonly owned networks. There should be a limitation on the number of affiliates permissible for one network owner in the smaller markets. Until we have an opportunity for further study of this question, we are requesting that ABC limit its AM affiliations and disaffiliate when necessary in markets with more than one AM station to no more than one affiliate in a 2-station market, 3-station market or 4-station market and no more than two affiliates in a 5-station market.[10] (Ftnt. 9 omitted).

* * * * * * *

"[10] For this purpose a radio market is considered to be the Standard Metropolitan Statistical Area (SMSA), or, if a community outside of an SMSA, then the community itself."

[2] *ABC Four Radio Networks*, 11 FCC 2d 163 (December 1967).

2. Some preliminary observations are necessary before taking up the various requests. First, the duty to choose program service from available sources rests on the informed judgments of local licensees and is fundamental to the public interest in broadcasting. Its proper exercise includes informed decisions whether to arrange for network service and if so, which network reasonably available will best serve the public interest in the community. We do not intend, by our order herein, to dilute this essential licensee responsibility. Nor, is it our objective to equalize competition among licensees or to require a network to affiliate with any particular station or vice versa. We seek to strengthen rather than weaken the concept that, by and large, the public interest is best served through competition among willing parties to determine network affiliation. Our order is directed to the limited number of situations where the public interest in diversity may require some constraint on licensees' freedom in the network affiliation process.

3. In our prior order we cautioned that one seeking waiver prospectively should assume the burden to demonstrate that waiver in his case would serve the public interest.[3] We emphasize this statement here, as we have received requests for "permission" to affiliate with ABC under circumstances prohibited by the terms of the order. Also, we have been asked to weigh the relative merits of one station as against another as an appropriate affiliate in a particular market. We can only repeat that we do not govern the affiliation process except in the rare case where necessary to protect the public interest against undue concentration. In no event do we grant "permission" to affiliate, nor do we designate affiliations nor decide the "comparative merits" of stations as affiliates.

4. Finally—this is an important element in our present action—the Commission will institute shortly an inquiry and rulemaking proceeding concerning network radio generally, including questions as to whether or not the 1969 policy on multiple network affiliations should be continued for the future more or less in its present form,[4] and (if it should) concerning adjustments which may be appropriate in it. The latter include the question of how to take into account FM service generally and FM affiliations with ABC or Mutual in particular, and some adjustment to take care of anomalies which appear to result from the standard used (the entire SMSA for communities within it, the individual community where it is outside an SMSA). Pending the termination of this proceeding, which is expected to be in this calendar year, at least as to this portion of it, it is appropriate to act generally to preserve the *status quo*—permitting existing affiliations to continue (and avoiding the resulting disruption) if there appears to be much of a possibility that they would ultimately be consistent with the policy as adopted, and not granting permission for new af-

[3] This burden is a heavy one, heavier than that necessary to justify continuation of an existing affiliation, as we emphasized in par. 37 of *ABC Four Networks*, 22 FCC 2d 241, 248 (April 1970).

[4] With respect to this basic question, we have to consider the facts that, on the one hand, unlimited affiliations with various networks of a single network company may represent an inordinate degree of concentration of control, and, on the other hand, that interconnection is expensive, and the economies resulting from spreading the cost over more than one network may mean that network service will be available to small market stations which otherwise could not afford it.

filiations except where it appears reasonably likely that the policy finally adopted will allow the additional network association. It is emphasized that all of the actions taken herein are subject to the outcome of that overall proceeding.

THE PENDING REQUESTS

5. This decision deals with 13 pending requests, in addition to two others, discussed briefly below, which apparently have been mooted and are dismissed on that basis.[5] The 13 include 9 requests for permission to continue the station's ABC affiliation, and 4 requests for permission to enter into an initial ABC affiliation.

6. *The requests to continue an ABC affiliation.* The 9 requests to continue an ABC affiliation—which has been permitted to continue by staff action pending Commission consideration of these situations—fall into the following categories:

(a) Two requests—stations in Daytona Beach, Florida and Half Way, Maryland—which under present circumstances are consistent with the letter of the 1969 policy even if possibly not entirely in accord with its objectives. Daytona Beach, where Station WMFJ seeks to continue as the second ABC affiliate in a city with 3 AM stations, became a Standard Metropolitan Statistical Area in 1971, and thus, under the policy, the pertinent unit is the SMSA (Volusia County), which has 9 AM stations, rather than the city and its 3 stations alone.[6] In the Maryland situation, Station WHAG is the only AM station licensed to Half Way, a very small community adjacent to Hagerstown, and therefore the literal wording of the policy does not operate to restrict it in affiliating with ABC, even though one of the two Hagerstown stations is also an ABC affiliate (these communities are not in any SMSA).

(b) Two situations—stations in Pasco, Washington (KORD) and Beacon, New York (WBNR)—where the conflict with the letter of the policy arises solely from the designation of these areas as new SMSA's in 1971, following the 1970 Census (designation of SMSA's is by the Office of Management and Budget). This means that the Pasco and Beacon stations which are ABC affiliates and the only stations licensed in their communities, are now counted with other ABC affiliates in these SMSA's, including ABC stations licensed to Kennewick and Richland, Washington, and to Poughkeepsie, New York. Thus, the ABC affiliations involved here represent either the third out of 5 AM stations or the second out of four AM stations in an SMSA, both exceeding the limits of the policy.

(c) Three situations where reconsideration was sought of denial by the Commission of waiver requests in 1970, involving stations in Joplin, Missouri (KQYX), Charlottesville, Virginia (WELK) and Massena, New York (WYBG) (in the first two cases, denial was not

[5] We do not here consider one pending request to continue an ABC affiliation, that of Station KBYG, Big Spring, Texas. This matter involves some complications and is being handled in a separate decision.

[6] Of the 6 AM stations in Volusia County outside Daytona, two are quite close to the city and put a strong signal over it (stations at Ormond Beach and South Daytona). Thus, in a sense, even aside from the matter of SMSA inclusion, this could be considered a 5-AM station market.

really on the merits of the case but because of either the failure to supply any significant amount of information or the request appeared to be moot).

(d) Two situations where later developments—the affiliation by ABC with an additional station in the market—will require disaffiliation by stations if the policy is applied. These are Minot, North Dakota (KHRT) and Kent, Ohio (WKNT). In the first, this is the second ABC affiliation out of 4 AM stations licensed to Minot; in the second, WKNT is the only AM station licensed to Kent but that city is in the Akron SMSA, where there are four other AM stations of which two are affiliated with ABC, making this the third of five.

7. *New requests for permission to affiliate.* The four requests for Commission permission to ABC to make an additional affiliation are by stations in Medford, Oregon (KBOY), San Luis Obispo, California (KSLY), Twin Falls, Idaho (KEEP) and Lima, Ohio (WCIT), all of which would represent the second AM ABC affiliation in these cities (Medford has a total of 4 AM stations, San Luis Obispo and Twin Falls three, and Lima two with one additional AM station at another city in the SMSA, Van Wert).

DISPOSITION OF THESE REQUESTS

8. As mentioned above, the Commission expects to begin in the near future (probably within two months) a general inquiry and rule-making proceeding concerning network radio, and particularly the "multiple network affiliation" aspect of it. Pending the termination of this proceeding, which is expected this year, at least as to this part of it, we believe it appropriate to act to continue the *status quo* in most respects—permitting existing affiliations to continue except where there does not appear to be much possibility that they will ultimately be found consistent with an appropriate overall rule or policy, and, conversely, not granting permission for new affiliations not permitted under the present policy, except where it is quite likely that they will be found consistent with the ultimate overall regulation.

9. *Requests for continued affiliation.* In connection with the first part of the foregoing principle, we find it appropriate to permit the continuation of 8 of the 9 requests for continued affiliation listed in par. 5, above, all but that for Massena, New York. These affiliations have been permitted to continue for a considerable time after the last Commission action, and there appears to be no reason to require their termination a fairly short time before the overall review of this subject is expected to be completed. In all of these 8 situations other than Massena, there are at least two other non-ABC radio services available (2 AM or AM–FM) from stations licensed to the same community, licensed to an adjacent community in the case of Half Way, Maryland, or licensed within the same SMSA in the case of Beacon, New York, Kent, Ohio, and Pasco, Washington. Immediate action to terminate these ABC connections does not appear warranted under the circumstances, and they are permitted to continue at least until 60 days after a Report and Order in a general proceeding dealing with this subject.

10. In Massena, New York, on the other hand, there are only two AM stations licensed to this city, no FM stations, and very little outside service at least in terms of primary service from U.S. stations (ground conductivity in northern New York is extremely low). This is the type of situation the "ABC four-network policy" adopted in 1969 was designed to prevent, as we noted in denying this request in 1970. Accordingly, while immediate termination is not being ordered, it is appropriate to set a definite termination date for one of ABC's present two affiliations in this market. We set January 1, 1975 for such termination, unless by further order the Commission decides otherwise.[7]

11. The fact that 8 of these 9 ABC affiliations are permitted to continue, pending the overall proceeding, does not by any means indicate that all of them will be permitted permanently. Some well may, for example Joplin, Missouri, where the facts are much the same as in the new request for Medford, Oregon, discussed and granted below (four local AM stations plus multiple strong outside non-ABC signals). On the other hand, the situation with respect to the "Tri-Cities" area of Washington, Richland-Kennewick-Pasco, shows almost as much ABC use of the available signals as does that in Massena (use of three of four AM stations licensed to these cities, and of both FM stations so licensed; the other AM and FM stations in the SMSA are at some distance and do not provide primary service to any of the three cities).

12. *New requests to affiliate with ABC.* Of the four new requests for permission to affiliate mentioned in par. 7, above, we conclude that that of Station KBOY, Medford, Oregon, should be granted at this time, and the others must be denied pending the general review mentioned. In the Medford situation, there are four locally licensed AM stations, plus at least two in nearby cities which provide strong non-ABC signals in Medford. All of the other networks are represented either in Medford itself (NBC), Ashland (CBS), or Grants Pass, slightly farther away (Mutual). It may be that KBOY will also carry ABC on its associated FM station (KBOY–FM), but there is also another FM channel in Medford carrying NBC. In sum, while there is a heavier burden on stations seeking ABC affiliation for the first time, and while this action is of course subject to whatever determination is ultimately reached in the general proceeding, we conclude that there is sufficient likelihood that this affiliation (ABC's second in the market) will ultimately be held permissible so as to warrant its grant at this time.

13. The other requests, we conclude, must be denied for the time being pending our overall review. In the Twin Falls, Idaho and San Luis Obispo cases, there are three AM stations in the community plus one close by, providing primary service daytime but not necessarily nighttime.[8] In the Twin Falls situation, there is one FM service, from

[7] This is not a final determination that, whatever ultimate policy is adopted, waiver in this one case might not be appropriate. However, it appears quite unlikely that any general policy will be adopted permitting this situation, so that, at the least, the licensee of whichever Massena station ABC decides to drop should have the burden of showing, in light of current information, why a waiver should be granted to permit ABC multiple affiliation with *all* of the outlets serving a given community, which it would have in this case.

[8] The Twin Falls petitioner lists other outside AM signals, but these are either nighttime skywave (KOA, Denver, etc.) or from communities at a greater distance. None of them provides 2 mV/m service to Twin Falls.

the same close-by community and non-ABC; in San Luis Obispo there is one independent FM station and one associated with the petitioning AM station (KSLY). It may be that, on consideration in our overall review, we will conclude that permitting two ABC affiliations in these cases is warranted, but we cannot reach that conclusion until the overall proceeding is completed. It appears questionable whether a second ABC AM affiliation in Lima would ever be appropriate, since there are only two AM and two FM stations in the city, and the other AM and petitioner's FM are already affiliated with ABC (as the other FM station possibly is also). While there is some outside primary FM service to Lima, the only other AM station in SMSA does not provide primary service (2.0 mV/m) to that city. It is conceivable that permission for ABC to have a second AM affiliation in Lima may ultimately be appropriate, but it certainly cannot be found to be so at this time.

14. *Two requests dismissed as moot.* Two other requests are dismissed as moot. One is from Station KPEP, San Angelo, Texas, which is for reconsideration of the Commission's April 1970 denial of its request for waiver; it appears that, while it was given authority by staff action in July 1970 to continue the ABC affiliation pending Commission action on its request, it is now no longer affiliated with that network. The second is a request by Station KVWO, Cheyenne, Wyoming, for permission to make an initial ABC affiliation (the second AM in that market). Accordingly to our information, this station has recently affiliated with Mutual, and accordingly its request appears to be moot. Were it necessary to decide these matters, our decision would be along the same lines indicated above: The San Angelo request would be granted pending the decision in the overall proceeding (there are two other San Angelo AM stations in addition to one already affiliated with ABC), and that for Cheyenne would be denied (there are two other non-ABC Cheyenne stations, but both petitioner's FM and the other FM are also ABC-affiliated, which would mean four ABC-affiliated radio stations out of a total of six).

ORDER

15. In view of the foregoing, IT IS ORDERED, That the prohibition contained in paragraph 25 of the Commission's Order of May 9, 1969 (17 FCC 2d 508, 514) IS WAIVED, as requested by the AM stations listed in parentheses below, so that the various networks owned by American Broadcasting Companies, Inc. may have affiliations with those stations as follows, until a date at least 60 days after decision in a general inquiry and/or rule-making proceeding concerning multiple network affiliations:

(a) Affiliation with the following AM stations in addition to one other AM station licensed to the same community: Joplin, Missouri (KQYX); Minot, North Dakota (KHRT); Medford, Oregon (KBOY); and Charlottesville, Virginia (WELK).

(b) Affiliation with AM stations in Beacon, New York (WBNR), Kent, Ohio (WKNT) and Pasco, Washington (KORD) in addition to one other AM station licensed to a community in the Poughkeepsie, New York SMSA (Dutchess County), two other AM stations licensed

to communities in the Akron, Ohio SMSA (Summit and Portage Counties) and two other stations licensed to Kennewick and Richland, Washington.

16. IT IS FURTHER ORDERED: That the prohibition of the Commission's Order of May 9, 1969 (17 FCC 2d 508, 514) DOES NOT APPLY to prohibit ABC affiliation with an AM station licensed to Half Way, Maryland in addition to one licensed to Hagerstown, Maryland; or to prohibit two ABC affiliations with AM stations licensed to Daytona Beach, Florida.

17. It is FURTHER ORDERED: That on or before January 1, 1975, ABC SHALL TERMINATE its affiliation with more than one AM station licensed to Massena, New York, unless a second affiliation is permitted by subsequent Commission Order.

18. IT IS FURTHER ORDERED, That the requests for waiver of the foregoing prohibition, filed by the licensees of the following stations, ARE DENIED, without prejudice to further consideration in connection with or after decision in an overall proceeding concerning multiple radio network affiliations, or, in the last two cases listed, ARE DISMISSED AS MOOT: KSLY—San Luis Obispo, California; KEEP—Twin Falls, Idaho; WCIT—Lima, Ohio; KVWO—Cheyenne, Wyoming; and KPEP—San Angelo, Texas.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-410

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUESTS FOR WAIVER REGARDING DISAFFILIATION FROM AMERICAN BROADCASTING CO., INC.—FOUR SPECIALIZED AMERICAN RADIO NETWORKS, IN BIG SPRING, TEX.

MEMORANDUM OPINION AND ORDER

(Adopted April 16, 1974; Released May 6, 1974)

BY THE COMMISSION:

1. The Commission here considers a request on behalf of AM Station KBYG, Big Spring, Texas, for permission to continue its affiliation with the ABC Entertainment radio network, despite the Commission's policy adopted in 1969 limiting the number of AM affiliations which ABC's various networks may have in markets with fewer than six AM stations, and despite the Commission's denial in 1970 of requests for waiver by the licensees of KBYG and another Big Spring AM station (KHEM). The KBYG request has been opposed by the licensee of another station there (KBST), and to some extent by the licensee of KHEM.[1] As discussed below, KBYG's ABC affiliation (American Entertainment) has been permitted to continue pending further consideration of its request.

BACKGROUND

2. ABC created its "four new specialized American Radio Networks" in 1967 starting in January 1968, and asked the Commission for an interpretive ruling to the effect that § 73.137 of the Rules (barring simultaneous dual network operations) was inapplicable to the ABC proposal. The Commission refused to make the requested ruling, but gave its encouragement to the basicallly non-simultaneous operation of this multiple network plan.[2] Mutual Broadcasting System, Inc. (Mutual) petitioned for reconsideration of the Commission's action, citing a number of alleged violations by ABC and problems cre-

[1] This policy, limiting ABC AM affiliations to one in markets with four or fewer AM stations (Big Spring has three), was adopted in May 1969, in *Mutual Broadcasting System, Inc.*, 17 FCC 2d 509, 514, when the Commission considered and otherwise approved ABC's four-network operation begun in 1968. ABC chose to retain its American Contemporary affiliation with KBST and notified the other two stations (then affiliated with other ABC networks) that they would be terminated. KBYG and KHEM requested Commission permission to continue, as did numerous stations in other markets similarly situated; in April 1970 (*Petitions for Waiver of Declaratory Rulings (ABC Four Networks)* 22 FCC 2d 241), the Commission granted the majority of the requests but denied these two, which were quite brief and informal, largely on the ground that sufficient information had not been submitted in support of the waiver request.

[2] *ABC Four Radio Networks* 11 FCC 2d 163 (1967).

ated by these multiple networks. The Commission denied the Mutual petition, but in so doing set forth the small market policy restricting the number of affiliates ABC could have in markets of five or fewer stations.[3] The relief sought here is a waiver of this small market policy as it applies to Big Spring, Texas.

3. After denial in April 1970 of the two Big Spring waiver requests as mentioned above, the then licensee of KBYG (Big Spring Radio, Inc.) filed a letter on May 26, 1970, asking that it be permitted to continue its existing ABC connection until October 1 of that year, on the basis of a pending application to assign the license of the station to new owners (Howard County Broadcasting, Inc., the present licensee). In a letter of July 6, 1970, covering this and four other situations where stations sought reconsideration of denial of their requests in the April 1970 order, the Deputy Chief of the Broadcast Bureau informed ABC that these stations might continue their ABC affiliations pending Commission action on their requests. Later, the new licensee of KBYG filed a letter request for an additional 90-day extension of the permission. There has been no further Commission action in this matter.

4. These requests have been vigorously opposed by the licensee of KBST, the station with which ABC originally chose to remain affiliated (Snider Corporation). The third AM station, KHEM, although it did not seek permission to continue its affiliation, in 1972 made two letter requests, in substance asking that the Commission either act to terminate the KBYG continuing affiliation, or give KHEM "equal opportunity" and permit it to affiliate with ABC also.

5. The lengthy pleadings filed by KBST and KBYG need not be discussed here at length. KBST argued that KBYG came in for temporary extension quite late (only 4 days before the May 30, 1970 deadline for disaffiliation), and has never shown grounds for waiver or really sought reconsideration of denial; moreover, it is claimed, the July 1970 staff action granting KBYG's request to continue was improper in that it amounted to reversal of a Commission action denying the request (and, in any event, KBYG's original and subsequently requested temporary extensions have long since run out). Therefore, it is claimed, the continuation is without authority and is illegal. KBYG, in addition to opposing these lines of argument, advances certain other points: (1) KBYG tried to get another affiliation, but CBS refused and NBC's offer was not financially feasible; (2) KBST is monopolizing the available networks in the market, being affiliated not only with ABC but also with Texas State Network (which supplies live, interconnected news service during parts of the day); (3) Both other stations in the market have network service, KBST two networks as mentioned and KHEM 17 news feeds daily from Interstate Broadcasting Company (not otherwise identified); (4) With this additional network service, and 13 outside stations receivable in the area, five outside daily

[3] *Mutual Broadcasting System, Inc.*, 17 FCC 2d 509 (May 1969). The pertinent portion of that Order, at page 514, is as follows: "Since the news and commentary programs for all ABC networks originate from one company, we cannot find it in the public interest to have all, or nearly all, of the stations in a market affiliated with commonly owned networks. There should be a limitation on the number of affiliates permissible for one network owner in the smaller markets. Until we have an opportunity for further study of this question, we are requesting that ABC limit its AM affiliations and disaffiliate when necessary in markets with more than one AM station to no more than one affiliate in a 2-station market, 3-station market or 4-station market and no more than two affiliates in a 5-station market."

newspapers, and television service,[4] diversity is adequate so that a second ABC affiliation would have no adverse consequences with respect to concentration of control of the broadcast media.

DISCUSSION AND CONCLUSIONS

6. Upon review of the foregoing matters, it is apparent that there is a substantial question as to whether Station KBYG should still be operating as a second Big Spring, Texas AM station affiliated with ABC. This is true because of its failure to file a timely request for *reconsideration* of the April 1970 action denying its waiver request (the action was April 1, 1970, and the letter request for extension was not filed until May 26), and because the short extensions originally and subsequently requested (in May and August 1970) have long since expired. It may well be questionable, also, whether a staff action permitting a situation to continue, after the Commission itself had denied this permission as a permanent matter, affords a valid basis for continuation of the situation for more than a brief period such as the four months originally requested.

7. However, procedural perfection is not always possible, here or generally, and it would be inappropriate to attach too much weight in our present deliberations, to these possible discrepancies out of the past. As discussed in another recent action involving some 15 other requests from the same period or later, the Commission will shortly institute an inquiry and/or rule-making proceeding concerning the subject of network radio generally, and in particular the restriction on multiple affiliations by a single network company in the same market adopted in 1969. Pending the conclusion of that matter, which is expected in 1974, it is appropriate to permit ABC to continue to have two AM affiliations in this market as it does now. Therefore, the decision herein, set forth in the ordering clause below, is that ABC may continue to have two affiliations with AM stations in Big Spring, until a date 60 days after the termination of that proceeding. In other words, the situation here is generally similar to that presented in a number of the cases dealt with in the other decision, rather than being akin to the Massena, New York situation, where we set a specific termination date because of ABC's present affiliation with *all* of the local stations (and with no substantial amount of outside service received). We do not find reason to order such an earlier termination here.

8. However, while the present situation does not fall into the latter category, this does not by any means necessarily indicate that it should be permitted to continue indefinitely. The amount of outside AM service received in Big Spring is not great,[5] and it may well be that ultimately we will conclude that ABC, or any other network, should be permitted only one affiliation among the three Big Spring AM sta-

[4] The off-air television signals assertedly receivable are KWAB, Big Spring (a satellite of ABC's affiliate in Monahans, Texas) and the three stations in the Odessa-Midland-Monahan's market (only one of which provides Grade B service to Big Spring). Four Dallas-Ft. Worth television stations are carried on the Big Spring cable system (ABC, two independents and one educational).

[5] Of the 13 outside AM stations listed by KBYG, two are at Midland, 37 miles away; the others are farther. It appears that probably only one of these (KCRS, Midland) puts over Big Spring the 2.0 mV/m signal required for primary service, although some others provide an 0.5 mV/m signal to the area.

tions. The action here, of course, is subject to the decision to be reached in the overall proceeding to be instituted shortly.

9. In our action here, we do not, of course, attempt to indicate to ABC what stations it should affiliate with. This has never been a purpose of the policy involved. Assuming that it wishes to keep two affiliates for the time being, there are three possible combinations—KBST–KYBG (the present lineup), KBST–KHEM and KBYG–KHEM. We express no view as to which of these is to be preferred or disfavored.

10. There is, in a sense, one qualification to the above. This is the matter of FM affiliations, which are not limited at all under the 1969 policy, and which present some problems which will definitely be involved in the forthcoming overall proceeding. As long as the ABC lineup in Big Spring remains as it is now, this presents no problem, since the only FM station is associated with KHEM, the non-ABC station. Since we are acting here largely to preserve the *status quo* pending the overall proceeding, it is not appropriate to permit ABC to expand its array of voices in this market by an FM affiliation on a full-time basis. Accordingly, the ordering paragraph provides that, if ABC continues to have two AM affiliates in this market, it may not have an FM affiliation there which will present ABC programs during the hours when both AM stations affiliated with it are operating (KHEM(AM) is daytime-only).

11. One other matter warrants comment, KBYG's argument that it should be permitted to retain its ABC affiliation, despite KBST's objections, because the latter has two networks at its disposal, Texas State Network in addition to ABC. This matter will also likely be included in the forthcoming proceeding, as to whether the Commission should adopt a rule or policy limiting the extent to which, where there are only a limited number of national or regional networks available in a market as a practical matter, one station should be permitted to have two or more of them.

12. In view of the foregoing, IT IS ORDERED, That American Broadcasting Companies, Inc. (ABC) MAY HAVE affiliations with two AM stations licensed to Big Spring, Texas, until a date 60 days after a decision in an overall proceeding concerning network radio; but that if ABC does maintain affiliation with two such stations, its programs may not be presented over an FM station licensed to Big Spring, Texas, during the hours when both AM stations are operating; and ABC shall take whatever steps are required to assure that FM broadcasting in contravention of the foregoing limitation does not occur.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-258

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of AMERICAN TELEVISION & COMMUNICATIONS CORP. For Construction Permits in the Domestic Point-to-Point Microwave Service for New and Modified Stations in the State of Florida	Files Nos. 6949 through 6953-C1-P-71; 6167 and 6168 - C1 - P - 72; 1123 and 1124-C1-P-73; 2741 and 2742-C1-P-73

MEMORANDUM OPINION AND ORDER

(Adopted March 13, 1974; Released March 18, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. The Commission has before it the above-captioned applications of American Television and Communications Corporation (ATC) that were filed respectively, on May 27, 1971; on February 7, 1972; on August 11, 1972; and on September 8, 1972. These applications propose new and modified microwave radio stations in the point-to-point microwave radio service for the purpose of relaying television signals to CATV systems in various communities along the Florida east coast and inland to various communities in central Florida.[1] ATC's proposal, which includes a request for waiver of Section 21.701 (i) of the Commission's Rules,[2] would cause the construction of nine new stations in the 6 GHz frequency band (5925-6425 MHz) and the modification of two existing 6 GHz relay stations. Petitions to deny the applications have been filed by Southern Bell Telephone and Telegraph Company (Bell). ATC has filed responsive pleadings.

2. ATC's proposed microwave route would be located generally along existing Bell routes on the Florida coast and in central Florida. Bell contends that a grant of these applications would be contrary to Section 21.701 (i) of the Commission's Rules as adopted in the *Second Report and Order* in Docket No. 15586 (11 FCC 2d 709). Bell, however, makes no claim of route blockage to its existing or currently planned facilities, but does assert that the area (Florida) is one of heavy usage of 4 and 6 GHz frequencies which are required to meet the extensive demand for communications in an area for which extensive growth is projected. ATC argues, conversely, that its proposed facili-

[1] The CATV systems have been previously authorized to import the television signals involved.

[2] Section 21.701(i) stated in relevant part: "Applications for new stations or frequency paths (except for power splits of existing frequency paths) in the bands of 3700-4200 MHz and 5925-6425 MHz which are to be used to relay television signals to community antenna television systems will not be accepted for filing or granted, *provided, however,* that waivers of this provision may be granted for good cause shown, including a showing that the proposed frequency usage is not likely to affect adversely the development of any major communications route; . . ."

ties would not preclude the development of new routes in the area and that the use of the 6 GHz frequencies is essential to the successful development of its route, since use of 11 GHz frequencies (10700–11700 MHz) in Florida is very difficult and costly due to rainfall problems. Moreover, ATC states that the majority of the 6 GHz systems in the area are not realizing the maximum utilization of the radio spectrum. It contends that such systems can carry only 600 to 900 voice grade circuits per radio channel and operate with a one-for-one frequency diversity configuration, and that if these same facilities were converted to 1800 circuit capacity, employing space diversity or protection channels on a 3-for-1 basis, the capacity of these systems would be greatly expanded. ATC asserts further that approximately 50% of the antennas on existing Bell and other common carriers routes in the area do not meet FCC antenna Standard A and that such antennas are greater obstacle to the development of future microwave routes than ATC's proposed facilities.

3. Before proceeding to discuss the merits, it would be helpful to briefly describe the layout of the proposed system. The first set of applications (File Nos. 1123/1124–C1–P–73) proposes the construction of two relay stations, one at Delray Beach (the head-end or pick-up station) and the second at Riviera Beach. These stations, using 6 GHz frequencies, would relay one video channel north to interface with ATC's existing microwave station at Stuart, Florida (KJE51). Construction of these two stations, according to ATC, would enhance the off-the-air reception of the signal of television station WCIX–TV, Miami, Florida, which is to be relayed throughout the proposed system.

4. In the second set of applications (File Nos. 6949/6953–C1–P–71), the existing station at Stuart (KJE51) would be modified to include a three-for-three exchange of existing 6 GHz frequencies and the addition of two new 6 GHz frequencies, increasing from 3 to 5 the number of 6 GHz channels that would be used on the existing Stuart (KJE51)—Fort Pierce (KJE52) radio path. On the final leg (Fort Pierce—Vero Beach) of the existing portion of the proposed system, a five-for-five exchange of existing 6 GHz frequencies is proposed, with no additional frequencies added.

5. The third set of applications (File Nos. 6167/6168–C1–P–72), in conjunction with the second set (above), contemplates the construction of a two channel 6 GHz system extending from Vero Beach to Melbourne and north to the communities of Cocoa and Merritt Island, Florida. The fourth and final set of applications (File Nos. 2741/2742–C1–P–73), would extend the same two channels to the communities of Kissimmee, Winter Haven, Orlando, and Daytona Beach, Florida.

6. In considering the requested waiver, we should refer to the initial waiver policy established in our *Memorandum Opinion and Order* in Docket No. 15586, released February 3, 1970 (21 FCC 2d 284). There we stated, in part, that:

> * * * we will grant requests for waiver of Section 21.701(i) where the proposed frequency usage is not likely to adversely affect the development of any major interstate communications route or otherwise be contrary to the public interest. * * * It is not anticipated that waivers will be granted in the vicinity of major metropolitan areas or in areas of heavy frequency usage (such as the northeastern states). * * *

Subsequently, this policy was essentially incorporated into the present rule as modified (see 32 FCC 2d 48). In applying this criterion to the case at hand, we note that ATC has submitted a detailed showing that analyzes the impact of each of its frequency paths on other nearby existing and proposed microwave systems. We have closely evaluated this showing and conclude that no existing or proposed route with any likelihood of growth would be blocked by ATC's proposed facilities. Indeed, Bell concedes that "the system, as currently proposed by ATC, does not harmfully interfere with Petitioner's present facilities and communication routes and *at this time* will not likely have an adverse effect on the currently known proposed plans of expansion by Southern Bell."

7. However, analyzing the general (as opposed to specific) frequency needs of the area is more difficult. We recognize that Florida is a rapidly growing area in population and that attendant to such growth is the need for extensive expansion and development of communication services. We also recognize that its peninsular geography and flat terrain limit the number of radio routes that can traverse its length. However, we also recognize the new technology for meeting Florida's rapidly increasing demand for communications is not especially dependent on new terrestrial microwave systems. For example, through new technology the capacity of existing 4 and 6 GHz systems is being increased by as much as 25 percent, a new L-5 carrier (90,000 voice channel capacity) is being installed on the Boston-Miami cable, and Bell and other common carriers have future plans to serve Florida by Domestic Satellite. None of this is to suggest that the 4 and 6 GHz spectrum should not be orderly conserved or that future demand for these frequencies in Florida is not anticipated. What is intended here is to show that ATC's proposed use of the 6 GHz band is not likely to hinder the development by Bell or other common carriers of high density communications facilities in Florida for the foreseeable future. Moreover, as ATC reasons, we believe that Bell and other common carriers in the area can achieve considerable growth potential alone through use of more modern and efficient equipments (antennas, transmitters, etc.).

8. Another factor that may have some relevance in weighing the relative merits of a Section 21.701(i) waiver request is the practicability of using frequencies in the 11 GHz band. In promulgating Section 21.701(i), we acknowledged that 11 GHz frequencies are less reliable for long haul systems due to rain attenuation, and that, consequently, 11 GHz transmission paths would have to be somewhat shorter than those paths for 4 and 6 GHz frequencies in order to achieve a comparable degree of reliability. The recitation of this fact normally would not be important in weighing a waiver request. However, a few areas of the country have weather patterns that embrace a high incidence of heavy or tropical rain downpours to which 11 GHz frequencies are particularly susceptible. The state of Florida ranks high among those areas that are principally subject to this type of rainfall. Therefore, we believe that the use of 11 GHz frequencies in Florida may not be a reasonable alternative to the use of 4 or 6 GHz frequencies because of the short spacing between relay stations generally required to over-

come attenuation due to rain. Accordingly, we recognize more than just an average need by ATC to use the lower band frequencies for the subject proposal.[3] However, we wish to emphasize that this consideration is of a secondary nature and does not, by itself, justify waiver of Section 21.701(i).

9. Considering the lack of impact of ATC's proposed frequency use on any existing or currently planned major communication routes, the apparent lack of critical general need for 4 and 6 GHz frequencies in the area in question for the foreseeable future, and the difficulties that ATC would have utilizing 11 GHz frequencies, we believe that the requested waiver, on balance, would serve the public interest. Also, we have reviewed ATC's applications and have concluded that the proposed facilities would serve the public interest and that ATC is financially, technically and otherwise qualified to render the proposed common carrier service. Therefore, the applications will be granted.

10. Accordingly, IT IS ORDERED, That the captioned applications ARE GRANTED.

11. IT IS FURTHER ORDERED, That the request for waiver of Section 21.701(i) of the Commission's Rules made in the captioned applications IS GRANTED.

12. IT IS FURTHER ORDERED, That the petitions seeking denial of the captioned applications ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[3] In initially proposing the frequency restrictions in Docket No. 15586, we recognized the problems of using 11 GHz frequencies in areas with exceptionally high rainfall density, and indicated that such areas would be treated on a case-by-case basis. See *Notice of Proposed Rule Making* in Docket No. 15586 (29 FR 11458), footnote 17.

FCC 74-459

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMERICAN TELEPHONE & TELEGRAPH CO.	File No. P-C-8241
HAWAIIAN TELEPHONE CO.	File No. P-C-8241-A
ITT WORLD COMMUNICATIONS, INC.	Files Nos. T-C-2441, T-C-2441-A
RCA GLOBAL COMMUNICATIONS, INC.	Files Nos. T-C-2437, T-C-2437-A
WESTERN UNION INTERNATIONAL, INC.	Files Nos. T-C-2436, T-C-2436-A
Applications for Authority To Participate in the Construction and Operation of an 845 Circuit Submarine Cable System Between the U.S. Mainland and Hawaii	
AMERICAN TELEPHONE & TELEGRAPH CO.	File No. P-C-8479
HAWAIIAN TELEPHONE CO.	File No. P-C-8426
ITT WORLD COMMUNICATIONS, INC.	File No. T-C-2533
RCA GLOBAL COMMUNICATIONS, INC.	File No. T-C-2530
WESTERN UNION INTERNATIONAL, INC.	File No. T-C-2532
Applications for Authority To Participate in the Construction and Operation of an 845 Circuit Submarine Cable System Between Hawaii and Okinawa via Guam and for Authority To Acquire on an Indefeasible Right of User Basis and To Operate for a Limited Period, Interest in a Commonwealth TASI-B System Between Sydney, Australia and Vancouver, Canada	

MEMORANDUM OPINION AND ORDER

(Adopted May 1, 1974; Released May 2, 1974)

BY THE COMMISSION: COMMISSIONER QUELLO NOT PARTICIPATING.

1. The Commission has under consideration:

a. A Petition for "Rehearing" filed on July 16, 1973 by Domestic Satellite Corporation (DSC), requesting reconsideration of the Commission's *Memorandum Opinion, Order and Certificate*, adopted June 14, 1973, which authorized the construction and operation of a trans-Pacific submarine cable system.

b. Oppositions filed on August 1, 1973 by the American Telephone and Telegraph Co. (AT&T), the Hawaiian Telephone Company (HTC), ITT World Communications Inc. (ITT), RCA Global Communications, Inc. (RCAGC), and Western Union International, Inc.

(WUI). A Response to the Petition was filed by the State of Hawaii through its Governor on September 10, 1973.

c. A Reply (styled "Opposition") to the Oppositions filed by DSC on August 16, 1973 and a Reply (styled "Opposition") to the State's Response filed by DSC on October 2, 1973.

d. Letters filed by the Legal Aid Society of Hawaii on August 1, 1973, August 7, 1973, September 4, 1973 and September 14, 1973, and by the Life of the Land on August 2, 1973 and September 17, 1973.

e. Replies to Commission inquiries filed by AT&T on July 27, 1973 and September 6, 1973.

2. The decision which is the subject of the Petition for Rehearing authorized AT&T, HTC, ITT, RCAGC and WUI to jointly construct and operate an 845 circuit submarine cable system from San Luis Obispo, California to Makaha, Hawaii and from Makaha, Hawaii to Okinawa, via Guam.[1] Applications for the Mainland-Hawaii segment of the proposed cable system were filed in September and November of 1971, and amended in 1972. The subject applications and amendments were listed on the Commission's Public Notices of Applications Accepted for Filing. In the course of the nearly two-year pendency of the applications, numerous pleadings and comments were submitted, including a filing by the State of Hawaii [2] which argued that authorization of the Mainland-Hawaii segment of the System would unjustifiably increase revenue requirements attributable to the composite system serving Hawaii. Moreover, the State contended, the present Mainland-Hawaii rate patterns were unduly discriminatory to Hawaii in that Mainland-Hawaii services were considered to be "international" rather than domestic services.

3. In response to the State's Petition, the applicants maintained that the rate treatment accorded the citizens of Hawaii was based on the State's unique geographical location, and upon the Communications Act of 1934 which precludes rate-averaging by the Mainland-Hawaii record carriers. On March 29, 1973, the State, through its Governor, withdrew its Petition primarily in reliance upon an agreement between AT&T and HTC pursuant to which reductions would be made in telephone message rates between the Mainland and Hawaii, calculated to result in savings to the Mainland-Hawaii ratepayer of an estimated $30 million in tolls in 1975.

4. On July 16, 1973, the Domestic Satellite Corporation (DSC), a corporation said by the petition to be organized under the laws of the State of Hawaii for the purpose of providing communications services, submitted a timely Petition for Rehearing,[3] pursuant to Section 405 of the Communications Act. The DSC *Petition* is defective in several respects,[4] primarily in its violation of Section 1.106 of the Com-

[1] Memorandum Opinion, Order and Certificate, released June 15, 1973, 43 FCC 2d 505 (hereinafter *Order*).

[2] "Petition to Institute Rate Inquiry Hearings, or, In the Alternative, to Deny the Application", filed by the Governor of Hawaii, through his attorney, December 17, 1971.

[3] Hereinafter *Petition*.

[4] The Petition failed to comply, in whole or in part, with Sections 1.49, 1.52 and 1.106 (b), and (d) and (f) of the Commission's Rules and Regulations. In its reply to Oppositions, DSC says it has no copy of the Commission's Rules available to it in Hawaii, and requests waiver of any rules with which it failed to comply. Alternatively, it requests that it be supplied with a copy of the Rules and allowed sixty days to refile its petition, on the grounds that it should not be penalized for a failure of the "U.S. Printing Office" to furnish it with an ordered copy of the Rules. Since it does not appear that the availability of a copy of the Rules would have enabled it to have cured the deficiencies on which we base our disposition herein of its *Petition*, we see no need to further consider this request.

mission's Rules. Section 405 of the Communications Act is implemented by Section 1.106 which states in pertinent part:

> (b) Except where the Commission has denied an application for review without specifying reasons therefor, any party to the proceeding, or any other person aggrieved or whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding it shall state with particularity the manner in which he is aggrieved or his interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.

We note that DSC did not file a pre-grant Petition to Deny the applications, nor any other appropriate comment, and was not a party to the proceedings prior to the grant of the applications. At the threshold, under our rule above, then, DSC must show good reason why it was not possible to participate in the earlier stages to the proceeding.

5. There is ample authority for the proposition that an individual who has a right to participate in a proceeding before the Commission cannot delay exercising that right until after the Commission has acted and then expect to be allowed to participate by filing post-grant pleadings.[5] An exception to this rule can be made where the public interest clearly dictates a different conclusion, as where an individual can show good reason for his previous failure to participate. DSC contends that the State of Hawaii, through its Governor, represented DSC's interest in the proceeding, and that for it to have participated earlier "would have been a duplication of the State's intercession, and therefore, an unnecessary burden on the Commission."[6] Moreover, DSC contends that the State represented all citizens of Hawaii, and its withdrawal, without DSC's authorization, was unlawful and denied DSC representation in this proceeding. We do not find such reason sufficient to consider DSC's Petition on its merits, since there was no bar to pre-grant participation by a citizen of Hawaii by reason of the State's intercession.

6. Administrative efficiency will not permit a party to lean back and await the outcome of a decision, and then, if it is unfavorable to its cause, to come forward seeking to present new evidence. "No judging process in any branch of government could operate efficiently, or accurately if such a procedure were allowed."[7] If a party has evidence to present he should present it in a timely fashion, and not rely upon another party to do so. If he does so rely, he cannot offer such evidence after a decision has been made.[8]

7. Although the DSC Petition will be dismissed as procedurally defective, we will, however, take this opportunity to clarify a point raised in the Petition. DSC contends that an environmental impact statement should have been submitted by the applicants and reviewed

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[5] Springfield Television Broadcast Corporation v. FCC, 328 F. 2d 186 (1964); Valley Telecasting Company, Inc. v. FCC, 336 F. 2d 914 (1964); KIRO, Inc. v. FCC, 438 F. 2d 141 (1970).

[6] DSC Opposition, August 16, 1973, p. 2.

[7] Colorado Radio Corporation v. FCC, 118 F. 2d 24, 26 (1941).

[8] DSC requests that we direct applicants to cease and desist construction of the cable, that the pleadings of the State be reinstated, and that the Governor be directed to present all facts and evidence collected in support of its pleadings. Even had such request been made at the time of withdrawal by the State, we do not think it would have been appropriate to grant the relief sought.

by the Commission prior to authorization of the Pacific cable. The Legal Aid Society of Hawaii and Life of the Land, Hawaiian groups concerned with the ecology, maintain that the Commission should have prepared an environmental impact statement before authorizing portions of the cable in Hawaii and its coastal waters. DSC and Life of the Land offer no reason for preparation of a statement. Although the Legal Aid Society states that local citizens are concerned about the "disruption or destruction of fishing areas in the proximity of the Makaha terminus, and the effect on delicate marine life of that area" [9] and its understanding that a construction barge will be anchored offshore for several months,[10] it does not supply a basis in fact for such concerns. The Commission has requested and received detailed information from AT&T concerning the laying of the cable,[11] which indicates that no significant environmental impact will result therefrom. Copies of this correspondence have been made available to DSC, the Legal Aid Society of Hawaii, and Life of the Land, none of whom have contested or attempted to rebut any of the factual statements set out by AT&T. In addition, the Commission has been furnished an assessment of the environmental effect of the cable on the Makaha area submitted by the Hawaiian Telephone Company to the Corps of Engineers.

8. Section 120(2)(c) of the National Environmental Policy Act of 1969 [12] requires all agencies of the Federal Government to prepare a detailed environmental impact statement before taking any major action significantly affecting the quality of the human environment. This provision does not require preparation of a statement prior to every action taken by the Commission, an undertaking which would be impossible and self-defeating in view of the fact that over 500,000 applications involving new or modified communications facilities are acted on annually by the Commission. Rather, it sets forth a threshold of environmental significance beyond which impact statements are required. In this respect, the Commission has authorized the construction and observed the operation of submarine cables at a variety of locations, including Makaha, Hawaii, over a period of 20 years. During this period, no evidence has come to our attention that construction or operation of such cables has had any significant environmental effect. The present project has been under study for an excess of two years. Nothing in the record even suggests that the project will have any material effect on the environment. In the case of the Makaha landing area, for example, the total environmental effect is that surfing in the immediate area will be interfered with for approximately two days while the cable is being towed to shore, and that sea animals which habitate a narrow strip within 50 feet of the shore will be disturbed during the brief period in which that strip is trenched and the cable is layed therein. The barge will be anchored about one mile offshore for about two days (not several months, as suggested). Fishing areas will not be disrupted or destroyed; the fact that fishing areas and delicate marine life exist in proximity to the four existing cables

[9] Letter of September 14, 1973.
[10] Letter of July 23, 1973.
[11] Commission letter of August 17, 1973 and AT&T response of September 6, 1973.
[12] 42 U.S.C.A. 4332(2)(c).

which terminate at Makaha is in itself a very persuasive basis for concluding that submarine cables have no significant effect on fishing or on sea animals. Finally, it should be noted that it is in the best interests of the applicants as well as the general public, to restore the beach area to its original condition, for security and other reasons. Therefore, based on our past experience and the facts brought out in the record, we conclude that the construction and operation of the proposed Pacific cable system would have no significant effect on the environment, making the preparation of an environmental impact statement unnecessary.

9. Accordingly, in view of the foregoing, IT IS ORDERED, that the "Petition for Rehearing" of the Domestic Satellite Corporation IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74D-13

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of SOUTHERN BELL TELEPHONE & TELEGRAPH CO.	Docket No. 19903 File No. 398-M-L-120
AUTOPHONE OF GAINESVILLE, INC. For a Public Coast Class III-B Radiotelephone Station To Serve the Lake Sidney Lanier, Ga., area.	Docket No. 19904 File No. 520-M-L-111

APPEARANCES

R. Frost Branon, Jr. on behalf of Southern Bell Telephone and Telegraph Company; and *Richard P. Breen* on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE
FOREST L. MCCLENNING

(Issued February 22, 1974; Effective April 17, 1974 pursuant to Section 1.276 of the Commission's Rules)

PRELIMINARY STATEMENT

1. By order released December 27, 1973, the above captioned applications for a new Class III-B Public Coast station to be located in the vicinity of Cummings, Georgia, were designated for hearing in a consolidated proceeding. By this order each of the applicants was found qualified to become licensees of the Commission. The Commission's rules, however, do not authorize the establishment of two new VHF stations of this class to serve the same geographical area. Hearing, accordingly, was ordered to determine comparatively which applicant would provide the public with the better public coast station service based on specified considerations.

FINDINGS OF FACT

2. February 1, 1974, Southern Bell Telephone and Telegraph Company (hereinafter Southern Bell) pursuant to Sections 1.961 and 81.29 of the Commission's rules filed its petition to dismiss application. Basis of the request is that withdrawal of the Southern Bell application would not work a disservice to the public as a qualified applicant continues to seek a license to serve the area and the withdrawal would be in the public interest as it would expedite radiotelephone service to the Lake Lanier area. The petition was accompanied by the requisite

affidavit of an officer of Southern Bell that it has not received or been promised any consideration, directly or indirectly, in connection with the filing of this petition to dismiss. By its comments to this petition the Chief, Safety and Special Radio Services Bureau moves for issuance of a summary decision pursuant to the provisions of Section 1.251 of the Commission's rules.

CONCLUSIONS

3. Autophone of Gainesville, Inc. has been found qualified to operate its proposed station. Dismissal of the Southern Bell application and grant of the application of Autophone would serve the public interest, convenience, and necessity in that it would avoid extended delay in institution of the proposed radiotelephone service to the Lake Lanier area. In view of the foregoing, there is no genuine issue as to any material fact and the dispositive issue may appropriately be determined on the basis of the motion for summary judgment.

Accordingly, IT IS ORDERED, That the said petition for dismissal is granted and the application herein of Southern Bell Telephone and Telegraph Company is dismissed.

IT IS FURTHER ORDERED, That unless an appeal from this Summary Decision is taken by a party to the proceeding or the Commission reviews the Summary Decision on its own motion in accordance with the provisions of Section 1.276 of the rules, the application of Autophone of Gainesville, Inc. is granted.

FOREST L. MCCLENNING,
Administrative Law Judge,
Federal Communications Commission.

FCC 74-36

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
BELL SYSTEM TARIFFS RE ENTRANCE, INTERCITY AND LOCAL DISTRIBUTION FACILITIES FOR OTHER CARRIERS FILED NOVEMBER 12, 1973, IDENTIFIED ON ATTACHMENT A

MEMORANDUM OPINION AND ORDER

(Adopted January 9, 1974; Released January 11, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. By Memorandum Opinion, Order and Authorization released September 12, 1973 (42 F.C.C. 2d 654), we granted the application of American Telephone and Telegraph Co. (AT&T) to construct and operate a domestic satellite communications system. The effectiveness of this Order was conditioned upon AT&T's written acceptance of the "conditions and understandings" with respect to the provision of interconnection facilities as specified in paragraph 21 of that Order providing, in part, as follows:

> * * * all charges, classifications, regulations and practices applicable to the provision by the Bell System companies of interconnection facilities shall be set forth in tariff schedules to be filed pursuant to Section 203 of the Act and Part 61 of [the] Rules [footnote omitted]. We shall also require AT&T to file such tariff schedules, except for specific charges, within 60 days from our grant herein. We recognize that the dollar and cents rates to be charged cannot be filed with similar promptness with the possible exception of charges for voice grade local loops. As urged by AT&T, it is not possible, with the possible exception of voice grade local loops to set forth the precise levels of charges for interconnect facilities and we recognize that charges may vary from location to location * * * But we expect the general tariff which we are requiring to be filed in 60 days from the date of this grant to set forth clearly all of the costs and other factors to be considered by the Bell System in developing its charges as well as the terms and conditions governing the service, except the exact rates.

2. On October 4, 1973 we adopted an order in letter form in which we rejected AT&T's contention that the Bell System companies were in compliance with the Communications Act and our decisions by filing tariffs with the state regulatory agencies for interconnection facilities furnished to specialized communications carriers licensed by us for interstate services. In our order we stated *inter alia:*

> * * * we are of the view that effective implementation of our policy objectives and the statutory scheme of the Communications Act require that you promply file tariff schedules with this Commission in accordance with Section 203 of the Communications Act which tariff schedules will provide the interconnection facilities essential to the rendition by the specialized carriers of all their authorized services on terms and conditions which are just, reasonable and non-discriminatory * * *

3. In purported compliance with these Orders of September 12, 1973 and October 4, 1973, the Bell System companies, on November 12, 1973, filed tariffs with us offering two types of access facilities to Domestic Satellite carriers: *entrance* facilities to be furnished under AT&T Tariff F.C.C. No. 265 and PT&T Tariff F.C.C. No. 123 and *intercity* interexchange channel facilities to be furnished under AT&T Tariff F.C.C. No. 266 and PT&T Tariff F.C.C. No. 124 and 14 Associated Bell System companies filed separate tariffs with us offering to provide *local distribution* facilities not only to Domestic Satellite carriers but to other carriers as well. All of the aforementioned tariffs were identified in our Public Notice of November 19, 1973, a copy of which is appended hereto as *Attachment A*. These tariffs were filed under protest and were accompanied by claims of the Bell System that we have no jurisdiction over the subject matter of the tariffs.

4. The tariffs were filed on 60 or more days' notice and will become effective on the published effective date unless we take action to suspend or reject them prior to such effectiveness. All but one of these tariffs are published to be effective January 11, 1974; the one exception is the local distribution tariff F.C.C. No. 37 of the New York Telephone Co., which has an effective date of February 24, 1974.

5. By letter dated November 14, 1973, the staff called to the attention of AT&T that none of these tariffs was accompanied by supporting cost and related data that appeared to be required by Sec. 61.38 of our rules and by letter of November 30, 1973. AT&T explained the reasons for not supplying such information and questioned the applicability of Sec. 61.38 in the particular circumstances of this case and requested waiver to the extent such rule is applicable. On January 7, 1974 the staff, under delegated authority, granted the requested waiver insofar as the request related to the failure to supply the Sec. 61.38 data at the time of filing the tariffs: the grant was without prejudice to the Commission requiring such data and information to be submitted in the future in connection with any further formal or informal investigation of such tariffs.

6. We now have before us petitions to suspend submitted on or before December 19, 1973 by: MCI Telecommunications Corp., Microwave Communications, Inc., MCI New York West, Inc., Interdata Communications, Inc., and MCI St. Louis-Texas, Inc., (collectively MCI); The Western Union Telegraph Co. (WU); the American Satellite Corp. (ASC); Data Transmission Co. (Datran) and Southern Pacific Communications Co. (SPCC). These petitions ask us to suspend the effectiveness of these tariffs and to set them for hearing on the questions of lawfulness raised by the petitioners. We also have before us petitions submitted by MCI, WU, CML Satellite Corp. (CML) and ASC asking us to reject the tariffs in question without further proceedings. The Bell System submitted its reply pleadings on January 3, 1974 in which it opposes all petitions to suspend or to reject.

7. MCI contends in its pleadings that suspension is not an adequate remedy for the alleged predatory tactics of the Bell System and that rejection is in order. However, SPCC states that the subject tariffs have been filed under protest and argues that it would be inappro-

priate for the carriers to be permitted to succeed in their resistance to filing, by having their tariffs rejected, or suspended for the maximum period authorized by statute. SPCC contends that provision for the necessary interconnection facilities by contracts under an interim basis is an unsatisfactory substitute for tariffs because the parties are unequal in bargaining power and there is an obvious reluctance on the part of the established carriers to aid specialized carriers to compete with them. SPCC contends that the tariffs are unlawful and asks us to suspend them for one day, to provide an accounting order for possible refunds, and to investigate the tariffs in a hearing at the earliest possible date. Datran argues that because Bell intends to treat other common carriers substantially like its private line customers, Bell is thereby discriminating in favor of its own affiliated carriers contrary to our determinations in Docket No. 18920. Datran also seeks a one-day suspension of the effective date of the local distribution facilities tariffs, a hearing and an accounting order.

8. MCI urges the rejection of the tariffs offering interexchange facilities to domestic satellite common carriers because such facilities are not offered to terrestrial carriers serving the same markets and urges the rejection of all tariffs on the alleged grounds that the tariffs are in violation of prior Commission orders and abrogate the contractual rights of WU. ASC urges that such tariffs be regarded as a sham and rejected as wholly inconsistent with the Communications Act, our conditions in the grant of AT&T's satellite authorization and extant Commission orders to provide meaningful and adequate interconnection. Similarly, CML urges rejection of the tariffs because the tariffs are alleged not to be responsive to our decisions and orders in the Domestic Satellite proceedings in Docket No. 16495. WU argues that the tariffs should be rejected because of the alleged attempt by the Bell System to abrogate their contracts and the failure to provide specifics in charges in some of the tariffs.

9. We are of the opinion that petitioners have raised certain substantial questions with regard to the lawfulness of the tariffs which warrant further investigation. However, except to rule at this time on the request that we postpone the effectiveness of these tariffs, we shall defer further action on the pleadings herein pending further proceedings we have initiated on December 12, 1973 in *In the Mattter of Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers, et al.*, in Docket No. 19896 (FCC 73–1299; released December 13, 1973).

10. First, these tariffs were filed with us in purported compliance with outstanding Commission orders. Although there are unresolved questions as to whether the tariffs are in full compliance with the Act and our decisions and orders, we believe that it is clear that they are at least in partial compliance. Thus, to suspend the effectiveness of the tariffs or to reject them at this time would be somewhat inconsistent with our conclusions that such tariffs are required to be filed with us in order to achieve compliance with Section 203 of the Act and our own decisions and orders. Furthermore, suspension of the tariffs or rejection now could deprive certain carriers of interconnection facilities who wish to obtain such facilities under such tariffs and could result in undue discrimination and preference among the different customers.

Finally, suspension of the tariffs with an accounting order is not necessary to protect the rights of the petitioners for the reasons that they have available to them the remedies under Sections 207–208 of the Act to obtain damages for which the filing carriers may be liable under the Act. We will treat the pleadings submitted herein by the entities named in paragraph 6 hereof as complaints under Section 208 of the Act and we will expect the carriers to maintain such records as are necessary to make appropriate refunds in the event that the matters here in issue are resolved in a manner requiring such refunds.

11. Second, we have instituted a show cause proceeding on our own motion in the aforementioned Docket 19896 which involves some of the same issues raised by petitioners herein. Thus, we have directed the Bell System companies to show cause, among other things, why filing of tariffs for domestic satellite interconnection facilities with state commissions, rather than exclusively with this Commission, should not be considered as non-compliance with a condition in its domestic satellite authorizations that such filings be made pursuant to Section 203 of the Act and Part 61 of our Rules; and to show cause why they should not be ordered to cease and desist from: "(a) altering, in any way, the provisions of exchange of facilities contracts with Western Union, except in strict accordance with the terms of such contracts;" and "(d) filing with state commissions tariff schedules of charges and regulations for services and facilities used for communications originating in one state and terminating in another state". Further, we ordered the Bell companies to continue to furnish the services and facilities required by exchange of facilities contracts with Western Union pending our further order. We ordered briefs by January 21, 1974 on the matters which we designated for oral argument before us on March 4, 1974 involving the subject tariff filings. We believe that, in the light of the foregoing, we should defer further action on the petitions to suspend and to reject the subject tariff filings until further proceedings in Docket 19896. To the extent that the questions raised by the petitions herein are not encompassed in the issues to be resolved in that proceeding, our present intention is to institute an investigation and hearing thereon in due course.

12. IT IS HEREBY ORDERED, That the aforementioned petitions ARE DENIED to the extent that they request suspension or postponement of the effective dates of the aforementioned tariffs and ARE DEFERRED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

Attachment A

COMMON CARRIER TARIFF FILINGS

(Report No. 13, November 19, 1973)

Carrier: American Telephone and Telegraph Co. and Bell Associated Companies; *Transmittal Nos.:* 11889, 11890, and others (see attached list); *Date Filed:* November 12, 1973.

On November 12, 1973, the Bell System filed with the FCC, tariffs applicable to the provision of facilities to other carriers for use in furnishing their end-to-end services to the public, to become effective January 11, 1974, except for the

New York filing to become effective February 24, 1074. These filings are summarized as follows:

(1) AT&A Co. Tariff F.C.C. No. 265, covers the furnishing of interstate entrance facilities by the Telephone Company to Domestic Satellite Common Carriers (DSCCs) between specified points in different exchange areas which are located in different states. These entrance facilities will extend the satellite channels of the DSCC between its earth station and the metropolitan center that the earth station is designed to serve.

(2) AT&T Co. F.C.C. No. 266, covers the furnishing to DSCCs of intercity facilities by the Telephone Company between specified points in different exchange areas which are located in different states. These intercity facilities will extend the satellite channels of the DSCC from its terminal location in one city to its terminal location in another city to meet the service requirement of its patron.

(3) Pacific Tel. & Tel. Co. Tariffs F.C.C. Nos. 123 and 124 cover the provision of entrance and intercity facilities within the geographical confines of California for DSCCs.

(4) Tariffs covering the provision of "local distribution" (from a carrier's office to its customer's location) facilities to Western Union, Specialized Common Carriers, Domestic Satellite Common Carriers and International Record Carriers (in gateway cities) in Bell served exchanges in those states where such facility requirements have been made known to the Telephone Company (states of Arizona, California, Colorado, Illinois, Indiana, Iowa, Maryland, Minnesota, Missouri, Nebraska, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Utah, Virginia, Wisconsin and the District of Columbia) were filed by twelve Associated Bell System Companies.

State	Transmittal No.	Carriers	Tariff No.
Arizona	535	Mountain Bell	50
California:			
LDA	839	P.T. & T. Co	122
Entrance	840	P.T. & T. Co	123
Intercity	841	P.T. & T. Co	124
Colorado	536	Mountain Bell	51
District of Columbia	230	C. & P. Telephone Co	32
Illinois	574	Illinois Bell	36
Iowa	807	Northwestern Bell	41
Indiana	616	Indiana Bell	31
Maryland	369	C. & P. of Maryland	34
Minnesota	809	Northwestern Bell	43
Missouri	1080	Southwestern Bell	59
Nebraska	808	Northwestern Bell	42
New Jersey	201	New Jersey Bell	31
New York	496	New York Telephone Co	37
North Dakota	806	Northwestern Bell	40
Ohio	536	Ohio Bell	35
Pennsylvania	294	Bell of Pennsylvania	36
Utah	541	Mountain Bell	56
Virginia	704	C. & P. of Virginia	36
Wisconsin	420	Wisconsin Telephone Co	33
Long Lines:			
Entrance	11889	A. T. & T. Co	265
Intercity	11890	A.T. & T. Co	266

FCC 74-471

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF CAMPBELL BROADCASTING, INC.,
RADIO STATION WGTM, WILSON, N.C.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted May 1, 1974; Released May 7, 1974)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN; AND HOOKS CONCURRING IN THE RESULT; COMMISSIONER QUELLO NOT PARTICIPATING.

1. The Commission has under consideration its Notice of Apparent Liability for forfeiture dated March 29, 1973 issued to Campbell Broadcasting, Inc., the licensee of Radio Station WGTM, Wilson, North Carolina, and (2) the licensee's response thereto dated May 16, 1973.

2. The Notice of Apparent Liability in this proceeding for forfeiture in the amount of one thousand dollars ($1,000) was issued for willful or repeated violations of Section 73.67(a)(3) of the Commission's Rules in that the station was operated by remote control during the period April 1, 1972 through May 23, 1972 when remote meter readings were inaccurate and operation by remote control should have ceased.[1] In addition, the Notice of Apparent Liability was issued for willful or repeated violation of Section 73.111(a) in that during the period April 1 through May 23, 1972, except for April 16, 1972, operators at the remote control point made entries in the operating logs without having actual knowledge of the facts reflected by the entries.

3. In response to the Notice of Apparent Liability, the licensee admits the violations as specified in the Notice of Apparent Liability and requests remission or mitigation of the amount of forfeiture. In support of this request the licensee states that it has experienced difficulty for many years with its malfunctioning directional array and describes the major renovation program carried on since 1969 to stabilize the array, involving substantial expenditures of money and hours. The licensee explains that in connection with the renovation program a consulting engineer removed sampling coils associated with the remote metering equipment without the knowledge of the licensee. In a prior response to an Official Notice of Violation the licensee stated that as soon as it discovered that the coils were removed, they were reinstalled on a temporary basis pending installation of a new remote

[1] Section 73.67(a)(3) provides as follows: "A malfunction of any part of the remote control equipment and associated line circuits resulting in improper control or inaccurate meter readings shall be cause for immediate cessation of operation by remote control."

system, and that some readings were made each day by the chief operator and checked with the studio location. Further licensee stated that after the station was inspected on May 24, 1972, all coils were repositioned and adjusted and that operators were instructed to cease operation by remote control should readings vary from normal, notify the chief operator and not resume operation until a first class operator was on duty at the transmitter.

4. Prior to the adoption of the Notice of Apparent Liability in this proceeding the Commission considered all of these matters which are again urged in the licensee's response. We find that the licensee repeatedly violated Sections 73.67(a)(3) and 73.111(a) of the Commission's Rules as above set forth. Although the licensee experienced difficulty in the operation of its directional array such problems will not excuse failure to comply with the Commission's Rules on log keeping and operation by remote control. Licensees are responsible for acts or omissions of their employees. *Eleven Ten Broadcasting Corp.*, 32 FCC 706 (1962); *Lawrenceville Broadcasting Co.*, 12 FCC 2d 903 (1968). Further a licensee will not be relieved of liability because of equipment problems. See *Radio San Juan, Inc.*, 32 FCC 2d 666 (1971). Considering all the circumstances in this case we are not persuaded to remit or mitigate the forfeiture.

5. In view of the foregoing, IT IS ORDERED, That Campbell Broadcasting, Inc. FORFEIT to the United States the sum of one thousand dollars ($1,000) for repeated violation of sections 73.67(a)(3) and 73.111(a) of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check, or similar instrument, payable to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for remission or mitigation of forfeiture may be filed within thirty (30) days from the date of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-382

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 73 OF THE COMMISSION'S RULES WITH RESPECT TO THE AVAILABILITY OF TELEVISION PROGRAMS PRODUCED BY NON-NETWORK SUPPLIERS TO COMMERCIAL TELEVISION STATIONS AND CATV SYSTEMS	Docket No. 18179

MEMORANDUM OPINION AND ORDER

(Adopted April 25, 1974; Released May 2, 1974)

BY THE COMMISSION:

1. On August 3, 1973, the Commission released the First Report and Order in this docket (FCC 73-806, 42 FCC 2d 175) in which a rule was adopted limiting geographical exclusivity in non-network program contracts between television stations and program suppliers. The rule as adopted reads as follows:

§ 73.658 Affiliation agreements and network program practices; territorial exclusivity in non-network program arrangements.

* * * * * * *

(m) *Territorial exclusivity in non-network arrangements.* No television station shall enter into any contract, arrangement or understanding, express or implied, with a non-network program producer, distributor, or supplier, or other person which prevents or hinders another television station located in a community over 25 miles away, as determined by the reference points contained in § 76.53 of this chapter, from broadcasting any program purchased by the former station from such non-network program producer, distributor, supplier, or other person. As used in this subsection, the term "community" is defined as the community specified in the instrument of authorization as the location of the station.

NOTE 1: Contracts, arrangements, or understandings that are complete under the practices of the industry prior to August 7, 1973, will not be disturbed. Extensions or renewals of such agreements are not permitted because they would in effect be new agreements without competitive bidding. However, such agreements that were based on the broadcaster's advancing "seed money" for the production of a specific program or series that specify two time periods—a tryout period and a period thereafter for general exhibition—may be extended or renewed as contemplated in the basic agreement.

2. The rule was to have been effective September 7, 1973. However, on August 31, 1973 (FCC 73-890, 38 Fed. Reg. 24367), the Commission stayed the effective date of the rule until November 12, 1973. The stay was issued in response to requests of the Association of Maximum Service Telecasters and others stating that they intended to file petitions for reconsideration of the Commission's action adopting the rule as set forth above. The parties filing timely petitions for reconsidera-

tion are listed below.[1] Because of unavoidable delays in the publication of Public Notices of the filing of several of the petitions for reconsideration, the last date for filing opposition pleadings to the petitions for reconsideration was October 1, 1973. (Order Extending Time for Filing Responses to Petitions for Reconsideration, Mimeo No. 08017, 38 Fed. Reg. 27218, issued September 24, 1973.) Opposition pleadings filed on or before October 1, 1973, were submitted by the parties listed below.[2]

3. The rule, as adopted, provides that program contracts negotiated on or after August 7, 1973, for non-network program material cannot provide for geographical exclusivity in excess of 25 miles from the community of license as determined by reference points contained in Section 76.53 of the Commission's rules. The requests for stay set forth two primary grounds for reconsideration: (a) the 25-mile rule would prohibit exclusivity in recognized multi-city markets, and (b) the 25-mile standard amounted to an inadvertent modification of the exclusivity provided to television stations by the Commission's action in adopting the cable television rules in 1972. The Commission issued the aforementioned November 12 stay to enable it to act on the petitions for reconsideration. A major consideration in staying the effective date of the rule was to enable parties to comment on the question of exclusivity given to television stations by the 1972 cable rules which were adopted long after the filing date (February 10, 1969) for comments in the geographical exclusivity portion of this proceeding. Because of the complexity of the issues, the Commission, in response to several requests, by Order of November 9, 1973 (FCC 73–1152, 38 Fed. Reg. 31680), stayed the effective date of the rule indefinitely pending action on the petitions for reconsideration. On December 6, 1973, the Commission issued a Public Notice (FCC 73–1278, 38 Fed. Reg. 34325) stating that it contemplated having the petitions for reconsideration acted on by mid-January, 1974.

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[1] Petitions for reconsideration: Association of Maximum Service Telecasters (AMST); Belo Broadcasting Corporation (Belo); Broadcast-Plaza, Inc. (Broadcast-Plaza); Cedar Rapids Television Company (Cedar Rapids); The Corinthian Stations and The Orion Stations (Corinthian and Orion); Daily Telegraph Printing Company (Daily Telegraph); Gateway Communications, Inc. (Gateway); Kaiser Broadcasting Company (Kaiser); Kansas State Network, Inc. (Kansas); Kelly Broadcasting Company (Kelly); King Broadcasting Co., et al. (King); McGraw-Hill Broadcasting Company, Inc. (McGraw-Hill); Metromedia, Inc. (Metromedia); Midwest Television, Inc. (Midwest); Multimedia, Inc. (Multimedia); National Association of Broadcasters (NAB); National Cable Television Association, Inc. (NCTA); Newhouse Broadcasting Corporation (Newhouse); Roy H. Park Broadcasting of Roanoke, Inc. (Park); Ponce Television Corporation (Ponce); RKO General, Inc., et al. (RKO); Rust Craft Broadcasting Company (Rust Craft); The Spartan Radiocasting Company (Spartan); Storer Broadcasting Company (Storer); Telemundo, Inc. (Telemundo); WAPA–TV Broadcasting Corporation (WAPA); Wichita-Hutchinson Company, Inc. (Wichita-Hutchinson); WGAL Television, Inc. (WGAL); WGN Continental Broadcasting Company (WGN); WJAC, Incorporated (WJAC); and Wometco Skyway Broadcasting Company (Wometco).

[2] Oppositions to petitions for reconsideration: American Broadcasting Companies, Inc. (ABC); Association of Maximum Service Telecasters (AMST); Columbia Pictures Industries, Inc. et al. (Program Suppliers); Corvallis TV Cable Co. (Corvallis); MCA, Inc. (MCA); Metromedia, Inc. (Metromedia); Midwest Television, Inc. (Midwest); RKO General, Inc., et al. (RKO); Scripps-Howard Broadcasting Company (Scripps-Howard); The Spartan Broadcasting Company (Spartan); Suburban Broadcasting Corporation (Suburban); Summit Radio Corporation (Summit); and WKRG–TV, Inc. (WKRG). Reply pleadings were timely filed by RKO; AMST; and WGN. The Association of Independent Television Stations, Inc. and Paducah Newspapers, Inc., Paducah, Kentucky, filed pleadings in the nature of petitions for reconsideration past the due date for filing such pleadings; they presented no material not contained in the pleadings that were timely filed, and they will be dismissed.

4. The views expressed in the petitions for reconsideration and subsequent pleadings will be generally treated on a topical basis, except in cases where specific views should be identified.

5. NCTA supports the 25-mile standard and urges that the Commission should reduce the exclusivity that a television station may secure against cable systems to 25 miles, the standard adopted by the First Report and Order herein. The oppositions of MCA, Program Suppliers, and Metromedia were specifically directed against the NCTA petition. The main premise in these three oppositions is that the exclusivity given to television stations (35 miles) by the 1972 cable rules cannot be modified without notice to and opportunity to comment by the stations. As to the NCTA petition, AMST, RKO, Midwest, and Spartan also challenge the Commission's authority to revise exclusivity permitted by the cable proceeding without notice to the parties. The comments of the parties opposing the NCTA suggestion were lengthy and vigorous. Because of the notice requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b), regarding notice and opportunity to comment, we are unable to consider the NCTA proposal.

6. All other parties oppose the 25-mile standard. Most urge that the Commission revoke it and handle any abuses of excess exclusivity on a complaint basis in an *ad hoc* manner. Some, while advocating repeal of the 25-mile standard, also propose specific alternative standards. Those alternative proposals will be analyzed in detail.

7. AMST filed a lengthy petition for reconsideration which claims that the 25-mile rule is far too broad and pervasive because it prohibits exclusivity in over 50 recognized multi-city television markets in which exclusivity is proper. It contends that the rule does not recognize the economic facts of the television market places, i.e., stations in actual competitive situations, and, instead, bases the exclusivity standard on the historical accident that stations were allocated to cities that are over 25 miles apart. It claims that because of the vast differences in the geographical areas of television markets, a single mileage figure based on reference points will not work. (AMST also contends that the 25-mile rule sharply restricts permissible exclusivity, insofar as cable television is concerned, in hyphenated markets.) As examples of such difference in area, AMST sets forth the Dallas-Fort Worth situation (approximately 35 miles apart) and the Minot-Bismarck, North Dakota situation (where the separation is over 100 miles). It contends that Bismarck and Minot, because of satellite operations, are full competitors. In contrast, AMST points out, because there are two distinct recognized markets involved, there may well be a question of the propriety of any exclusivity in the case of the Hartford, Connecticut-Springfield, Massachusetts situation even though, by reference points, the cities are only 22 miles apart.

8. AMST states that the Commission's intention was to "free up" programming in situations wherein there is a small overlap of service area, but that in the First Report and Order, the rule adopted is rather to protect stations in "overshadowed" cities (cities in or near a larger television market) which serve "fringe area" audiences and which are in actual direct competition with the larger city station. AMST then sets forth eight specific situations of cities with reference points over

25 miles apart whose television stations are direct competitors. AMST concludes that there should be no rule, but rather a general policy statement should be adopted that outlines the Commission's concern with the problem of geographical exclusivity.

9. Nevertheless, AMST does set forth alternative solutions to the 25-mile rule, should the Commission not adopt its suggestion to rescind the rule and use the case-by-case method. The alternatives are: (1) a television station should at least be permitted to contract for exclusivity up to 35 miles (the specified zone of a television station defined in § 76.5 of the Rules); (2) a television station should be permitted to contract for exclusivity against other stations in "designated" or "name" communities that are traditionally part of the same hyphenated market; and (3) case-by-case exceptions to the foregoing rules, but without evidentiary hearings.

10. Specific multi-city market problems are set forth in the pleadings of AMST, Belo, Broadcast-Plaza, Cedar Rapids, Corinthian and Orion, Daily Telegraph, Gateway, King, Kansas, Kelly, McGraw-Hill, Midwest, Multimedia, Newhouse, Park, Rust Craft, Spartan, Wichita-Hutchinson, WGAL, WKRG, and Wometco. All of the foregoing petitioners urge recision or revision of the rule. The petitions of Storer, Metromedia, NAB, Kaiser, RKO, WJAC, and WGN, oppose this aspect of the rule as adopted, but were topical rather than covering a specific multi-city market problem. MCA, in its opposition to the NCTA petition, also urges the Commission to reconsider the multi-city market question. Kaiser, who filed comments on the territorial exclusivity question, urges, should the 25-mile standard not be modified, that the Commission adopt a definite waiver policy to ameliorate the harshness that could occur in multi-city situations. RKO disagrees with the waiver position urged by Kaiser, because it would "work unreasonably and unequitably in all markets in which it would have an impact."

11. RKO and WGN, like AMST, urge that the Commission adopt the *ad hoc* approach to resolve any multi-city situations where abuses are turned up in exclusivity involving syndicated programming. Should the Commission not permit exclusivity against stations in other communities of hyphenated markets, Kaiser also asks that the Commission clarify the methods permitted to a licensee, consonant with the rule, to protect itself should the program be sold to a station in another community in the multi-city market. Ponce, Telemundo and WAPA–TV are licensees of Puerto Rican stations and contend that all communities of Puerto Rico should be considered to be one market with any TV station on the island being able to secure exclusivity against other stations on the island.

12. Suburban, the permittee of a UHF television station in Patchogue, New York, which is somewhat overshadowed by the New York City television stations, in its opposition pleading, states that it is in general support of the 25-mile rule. The opposition pleadings by Corvallis and Summit, respectively the licensees of "overshadowed" stations KVDO and WAKR–TV in Salem, Oregon, and Akron, Ohio, submit alternative solutions for resolving the overshadowed situations. VHF Station KVDO at Salem is located 45 miles from Portland,

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Oregon. Heretofore, most non-network program contracts between the Portland stations and the suppliers provided for exclusivity against the Salem station. The solution proposed by Corvallis is to revise the rule by deleting the 25-mile standard and prohibiting the securing of exclusivity against an "overshadowed" station. Corvallis proposes a revised rule that lists "overshadowed communities" to be Akron, Ohio; Fond du Lac, Wisconsin; Manchester, New Hampshire; Modesto, California; Salem, Oregon; San Jose, California; Tulare, California; and Worcester, Massachusetts. Stations in the foregoing eight communities, either in the comments in response to the Notice or other data filed with the Commission, urged that the Commission take some action to allow them to compete for non-network programming that was denied to them because of exclusivity provisions in contracts of television stations located some distance from them. UHF Station WAKR–TV at Akron is situated approximately 29 miles from Cleveland, Ohio. Summit submits two possible solutions that would revise the 25-mile standard, and still retain a general rule. The first alternative is to prohibit exclusivity against a station in another television market as set forth in the 1972 *ARB Television Market Analysis*. The second alternative is a rule that would retain a 25-mile standard, but only in the top 50 markets. These two solutions of Summit are vigorously opposed in the reply pleadings of AMST, RKO and WGN. The basis of the three oppositions is that the proposals are unrealistic and really amount to special legislation for a few "overshadowed" communities. On the other hand, ABC, in its opposition, is of the view that the 25-mile standard is probably too harsh, and submits that the alternatives proposed by Summit would assist in alleviating the "overshadowed" problem.

13. Other parties specifically commenting on the "overshadowed" market question include NAB, which states that it has no solution to the problem, but that the 35-mile standard of the specified zone adopted in the cable report, which was part of the NAB–NCTA consensus agreement, should be utilized. King and WJAC urge that the Commission adopt a case-by-case approach to resolve this "overshadowed" problem, with WJAC suggesting reference to transmitter locations of the competing stations. Storer, in general, reiterates its contention set forth in its comments in response to the Notice that price is the main problem in the "overshadowed" market situation, *i.e.*, "overshadowed" stations are simply not willing to pay the price at which a program is offered to stations serving all or a portion of the same market area. Similarly, Scripps-Howard intimates that the Akron station does not wish to pay the prevailing price for non-network programs, even though it does actively solicit advertising in competition with WEWS in the same market.

14. RKO, in its reply pleading points out that the Summit and Corvallis proposals are not feasible alternatives because they have not shown that those markets should be insulated from competition and reiterates the positions urged in its petition and opposition. AMST, also in its reply pleading, challenges a position taken by the Patchogue station that even a 35-mile standard could work to deny programming to many television stations near New York City; and, it also contends that the Summit and Corvallis proposals are not feasible as a

general standard. WGN, in reply, contends the different alternatives of Suburban, Corvallis and Summit support its position that a general rule is unnecessary and unworkable.

15. Metromedia and RKO contend that the Commission is without authority to adopt rules limiting territorial exclusivity because it amounts to an unreasonable restriction on the business practices of broadcasters. RKO also contends that the rule is contrary to copyright and antitrust laws. Finally, King contends that because of the vote on the First Report and Order (2 Commissioners voting for the document, with four Commissioners concurring in the result), the rule is procedurally defective.

16. Most of the parties contend that they never had an opportunity to comment on the modification of the exclusivity provided to television stations by the cable rules. As set forth above, the Commission, in part because of this contention, stayed the effective date of the rule.

17. As we stated in the Notice of Proposed Rule Making (FCC 68–511, 33 Fed. Reg. 7158) initiating this proceeding, the Commission had little specific information on the non-network program situation. The parties filing comments in opposition to the proposed rule supplied little factual data and their comments were very general in nature. The petitions for reconsideration are much more specific as to the multi-city market problem, and they recognize the "overshadowed" market situation as a very real one. Moreover, in these petitions, the parties had their first chance to comment on the revision of the exclusivity made available to television stations by the cable television rules. The petitions and responsive pleadings fully explore the foregoing issues and submit possible solutions to assist us in solving them.

18. We have considered all the pleadings filed concerning the First Report and Order and have concluded that the 25-mile standard should be modified. In the cable Report and Order (36 F.C.C. 2d 143 (1972)) which reflected the so-called consensus agreement, the rule permitted television stations to secure exclusivity against cable systems in other communities in hyphenated markets, as well as setting the 35-mile standard to be the specified zone of a television station. At the time that the 25-mile standard was adopted in this proceeding, we felt that the 25-mile distance would have little effect on syndicated distribution patterns, but that it *might possibly* open up the negotiations for programming for all stations including the so-called overshadowed stations. Moreover, there were no data on file with the Commission relating to exclusivity matters that were provided for in the cable rules as adopted in 1972. Because the date of the cable Report and Order was so much later than the closing date for filing comments in the geographical exclusivity portion of this proceeding, we, in effect, can consider the First Report and Order in this proceeding as having provided the first opportunity for the parties to comment on the possible reduction of the exclusivity for television stations provided by the cable rules in hyphenated markets.

19. We recognize that the Commission could adopt the case-by-case approach to resolve any problem situations involving abuses as to exclusivity in the syndicated programming area. However, because the process of resolution is so time consuming, and because so many people

will be engaged in the sales of such program fare, we believe a specific rule with limited exceptions is the most definite and prudent course of action. In addition, because the rules here adopted are intended to have a broad general applicability, it should not be assumed that any particular contract or exclusivity practice is necessarily reasonable and insulated from antitrust or other scrutiny simply because it does not violate the rules here adopted. These rules are intended only to establish some outer limits to the exclusivity practices in question. We think it likely, in fact, that even within the market lists (Section 76.51 and ARB) here relied on, that there are stations which, if purchasing exclusivity against each other, will be approaching the edge of what a full review of the circumstances might reveal to be "undue" exclusivity. *U.S.* v. *Paramount Pictures, Inc.*, 66 F. Supp. 323, 70 F. Supp. 53 (S.D.N.Y., 1947), noted with approval by the Supreme Court, 334 U.S. 131 (1948). The same would, of course, hold with respect to the purchase of programming exclusivity against cable television system use. As noted in the *Cable Television Report and Order*, *supra*, footnote 54, "In some markets the designated communities are located so far apart that a sale in one does not and should not preclude a sale in the other." Although we had hoped in this proceeding to be in a position to further clarify which situations are involved, it appears that the variables are sufficiently numerous, including the geography, demography, terrain of the area as well as the characteristics of the particular stations involved, that we are not now taking that step. This is, however, a matter which clearly warrants our continuing concern.

20. Even though there is still little, if any accumulated information on the operation of the cable rules, other than that contained in the comments, it may well have been premature to lower territorial exclusivity to the 25-mile standard as well as not to provide for exclusivity in the hyphenated market situations. Therefore, we shall modify the territorial exclusivity rule adopted in the First Report and Order of the present docket. We shall (a) raise the mileage standard in Section 73.658(m) of the Commission's Rules to 35 miles as determined by the reference points contained in Section 76.53 [3] of the Rules, except that for a two-year period, beginning with the effective date of this modification, television stations licensed to Cleveland, Ohio, may not secure exclusivity against a television station licensed to Akron, Ohio, and television stations licensed to Stockton, California, may not secure exclusivity against a television station licensed to Modesto, California, and (b) permit television stations in hyphenated markets to secure exclusivity against other television stations in the same hyphenated markets as contained in the listing of major television markets contained in Section 76.51 of the Commission's Rules (for the top 100 markets), and for markets below the top 100, the listing of markets contained in the *ARB Television Market Analysis* for the latest year at the time the contract, arrangement or understanding is complete under practices of the industry. In addition, Puerto Rico will be considered to be a single television market so that any TV station on the island may secure exclusivity against any other station there.

[3] As provided in Section 76.53, if a community does not have a listed reference point, the coordinates of the location of the main post office will be used.

21. The reference points between Cleveland and Akron are approximately 29 miles apart, and the Modesto-Stockton reference points are approximately 27 miles apart. In their respective comments in this proceeding, they have submitted data concerning the impossibility of negotiating with the program suppliers, and they have also submitted data that some negotiations had tentatively resulted in the future delivery of programs, but that the contracts were later cancelled by the suppliers prior to actual delivery of the programs. As many parties have recognized in their petitions for reconsideration, there is a genuine concern by the Commission to "free up" program availability for "overshadowed" stations. A general rule would be preferable, if feasible. However, because of the exclusivity provided to television stations by the cable rules, a revised 35-mile general rule, with a limited exception, is here being adopted. The licensee of Akron UHF station WAKR–TV has always claimed that it operates its station for Akron and does not attempt to operate as another Cleveland television station, even though it has the technical facilities to provide service to Cleveland. The Modesto UHF station's programming appears to include substantial Spanish-language programming. Because of these unique situations in Akron and Modesto and their claimed frustrations at not being able to negotiate with program suppliers because of territorial exclusivity held by Cleveland and Stockton stations, respectively, we shall, for a two-year period, not permit the Cleveland, Ohio television stations to secure territorial exclusivity against WAKR–TV, Akron, Ohio, or permit the Stockton, California television station to secure exclusivity against KLOC–TV, Modesto, California.[4]

22. With this two-year exception, WAKR–TV and KLOC–TV will have the opportunity to negotiate for syndicated program fare. Each year on September 1, these two stations will be required to submit factual data concerning their negotiations and the results of such negotiations. Hopefully, with the data obtained we can take any needed appropriate action with respect to these two specific "overshadowed" situations and the general "overshadowed" market problem.

23. It is reiterated that the Commission still has little knowledge or data concerning program distribution patterns as regard non-network syndicated programming. Still, at this time, we do not envision a requirement that such contracts should be filed with the Commission. To gain additional experience under the cable rules as they relate to syndicated program exclusivity, with the exception of the Akron and Modesto situations outlined above, we are adopting the modifications noted above. The special problems of Puerto Rico are discussed hereafter, whereby we are also creating a limited exception for that island.

24. Puerto Rico is contended to be unique, because of the fact that the language in general use is Spanish and for other reasons. It is contended by the Puerto Rican parties filing comments herein (WAPA, Ponce and Telemundo) that Puerto Rico, irrespective of distances, should be considered a single market. This is urged because the programming of the San Juan stations and the Ponce station are

[4] The difficulties encountered by KLOC–TV in their program negotiations were contained in the comments filed September 26, 1968, prior to commencing Spanish language programming.

broadcast throughout the entire island by rebroadcast agreements, satellites, and translators. It is contended by all three parties that anything less than island-wide exclusivity would disrupt past patterns as well as inhibit the development of four diversified program "networks" (the "flagship" stations being the two San Juan stations, the San Juan-Caguas station, and the Ponce station). Because of the uniqueness of the television broadcast program situation in Puerto Rico, and because of the unanimity of the comments filed by competing stations, the island of Puerto Rico will be considered to be one market for the purposes of territorial exclusivity. (This action, however, is without prejudice to any decision to be made in Docket No. 19974, the proceeding concerning television assignments in the San Juan and Ponce, Puerto Rico area.)

25. The position of King concerning the alleged procedural defect resulting from the fact that only two Commissioners voted for the Report and Order, with a concurrence by 4 Commissioners, is not well taken. King cites no specific authority other than that the APA requires that "the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c), and Section 1.425 of the Commission's Rules require that the "Commission will . . . issue a decision incorporating its findings and a brief statement of the reasons therefor."

26. The First Report and Order did set forth a concise general statement of the basis and purpose for adoption of the 25-mile standard, *i.e.*, to possibly open up negotiations for non-network programming for "overshadowed" television stations, especially the UHF stations. Two Commissioners voted for the Report and Order, which is the decision of the Commission. Four Commissioners concurred in the result which means that they voted for the rule, as adopted. However, for reasons of their own, they did not issue any concurring statements. The Commission's decision, we believe, met the requirements of Section 553(c) of the Administrative Procedure Act and Section 1.425 of the Commission's Rules.

27. Metromedia contends that the Commission is without authority to adopt a mileage exclusivity standard in non-network programs on the theory that, historically, under the *Sanders* case, the Commission does not have authority to regulate the business of the licensee, *i.e.*, supervisory control of programs and business management or policy. RKO claims that the Commission has not reconciled the purpose of the mileage rule with the policies of the copyright and antitrust laws. In the First Report and Order, the Commission set forth its basis for the adoption of the rule. The rule was the Commission's opinion of a reasonable one that would enable certain television stations to bid for programming. The development of broadcast stations is in the public interest and all that the Commission is attempting to do is assist in this development. Upon the showing made in the petitions for reconsideration, for the reasons set forth above, the Commission believes that the rule should be less restrictive and is so modifying it. Since the rule is less restrictive than that originally adopted, it will apply to all contracts finalized on or after August 7, 1973 (the date of publication of the First Report and Order in the Federal Register), a require-

ment that is consistent with the orders of stay previously entered in this proceeding.

28. In view of the foregoing, IT IS ORDERED, That the petitions for reconsideration ARE GRANTED to the extent indicated above and ARE DENIED in all other respects; and IT IS FURTHER ORDERED that pursuant to the authority contained in Sections 4(i), 303(g) and 307(b) of the Communications Act of 1934, as amended, and because the prior notice and effective data provisions of the Administrative Procedure Act (5 U.S.C. 553) are unnecessary, Section 73.658(m) of the Commission's Rules IS MODIFIED, effective May 10, 1974, as set forth in the Appendix.

29. IT IS FURTHER ORDERED, That the pleadings filed by Association of Independent Television Stations, Inc. and Paducah Newspapers, Inc. ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part 73 of the Commission's Rules is amended as follows:

1. Section 73.658(m) is amended to read as follows:

§ 73.658 Affiliation agreements and network program practices; territorial exclusivity in non-network program arrangements.

* * * * * * *

(m) *Territorial exclusivity in non-network arrangements.* No television station shall enter into any contract, arrangement or understanding, express or implied, with a non-network program producer, distributor, or supplier, or other person which prevents or hinders another television station located in a community over 35 miles away, as determined by the reference points contained in § 76.53 of this chapter (if reference points for a community are not listed in § 76.53, the location of the main post office will be used) from broadcasting any program purchased by the former station from such non-network program producer, distributor, supplier, or other person, except that a television station may secure exclusivity against a television station licensed to another designated community in a hyphenated market specified in the market listing as contained in § 76.51 of this chapter for those 100 markets listed, and for markets not listed in § 76.51 of this chapter, the listing as contained in the *ARB Television Market Analysis* for the most recent year at the time that the exclusivity contract, arrangement or understanding is complete under practices of the industry. As used in this subsection, the term "community" is defined as the community specified in the instrument of authorization as the location of the station.

NOTE 1: Contracts, arrangements, or understandings that are complete under the practices of the industry prior to August 7, 1973, will not be disturbed. Extensions or renewals of such agreements are not permitted because they would in effect be new agreements without competitive bidding. However, such agreements that were based on the broadcaster's advancing "seed money" for the production of a specific program or series that specify two time periods—a tryout period and period thereafter for general exhibition—may be extended or renewed as contemplated in the basic agreement.

NOTE 2: For a two-year period beginning May 10, 1974, television stations licensed to Cleveland, Ohio, and Stockton, California, may not enter into any contract, arrangement or understanding, express or implied, with a non-network program producer, distributor, or supplier, or other person which prevents Station WAKR–TV, Akron, Ohio, and Station KLOC–TV, Modesto, California, respectively, from broadcasting programs purchased by those Cleveland, Ohio, and Stockton, California stations.

NOTE 3: It is intended that the top 100 major television markets listed in § 76.51 of this chapter shall be used for the purposes of this rule and that the listing of the top 100 television markets appearing in the *ARB Television Market*

Analysis shall not be used. The reference in this rule to the listing of markets in the *ARB Television Market Analysis* refers to hyphenated markets below the top-100 markets contained in the *ARB Television Market Analysis.* If a community is listed in a hyphenated market in § 76.51 and is also listed in one of the markets in the ARB listing, the listing in § 76.51 shall govern.

NOTE 4: The provisions of this paragraph apply only to U.S. commercial television broadcast stations in the 50 states, and not to stations in Puerto Rico or the Virgin Islands, foreign stations or noncommercial educational television or "public" television stations (either by way of restrictions on their exclusivity or on exclusivity against them).

NOTE 5: New stations authorized in any community of a hyphenated market listed in § 76.51 of this chapter or in any community of a hyphenated market listed in the *ARB Television Market Analysis* (for markets below the top-100 markets) are subject to the same rules as previously existing stations therein. New stations authorized in other communities are considered stations in separate markets unless and until § 76.51 is amended by Commission action, or the ARB listing is changed.

FCC 74-378

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of COLUMBIA BROADCASTING SYSTEM, INC. For Renewal of License of Station WCAU-TV, Philadelphia, Pa.	File No. BRCT-10
STATION WCAU-AM, PHILADELPHIA, PA.	File No. BR-365
STATION WCAU-FM, PHILADELPHIA, PA.	File No. BRH-17

MEMORANDUM OPINION AND ORDER

(Adopted April 10, 1974; Released May 3, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration: (i) the above-captioned applications for renewal of licenses for Stations WCAU-AM, WCAU-FM, and WCAU-TV, Philadelphia, Pennsylvania, filed May 3, 1972, by Columbia Broadcasting System, Inc., hereinafter CBS or the licensee; (ii) a petition to deny directed against the above-captioned applications, filed June 30, 1972, by Concern Communicators et al., hereinafter Concern Communicators or petitioners; and (iii) an opposition to the petition to deny, filed September 8, 1972, by CBS.

2. Also before the Commission for consideration is a "Petition to Prevent Continued Violations of Commission's Equal Employment Opportunity Rules", filed July 3, 1972, by Janet C. Whittaker et al., hereinafter the Whittaker petitioners, directed against the pending renewal applications of 28 broadcast stations located in the Philadelphia, Pennsylvania area, including Stations WCAU-AM-FM-TV; a "Motion to Dismiss and Opposition" to the Whittaker petition, filed July 31, 1972, by CBS: a reply to the motion to dismiss and opposition, filed September 19, 1972, by the Whittaker petitioners; and various other related pleadings.[1]

3. Generally, Concern Communicators maintains that CBS has failed "to adequately serve the taste, needs and interests" of Philadelphia's Black community. Concern Communicators contends in this regard that CBS failed to adequately ascertain the needs and interests of Blacks, to adequately program for Blacks, and discriminated against Blacks in its employment practices. In this latter regard, the Whittaker petitioners also maintain that CBS has discriminated against Blacks in its employment practices. Each of these charges will

[1] Also before us is a "Motion to Strike" filed by CBS on July 17, 1972 against the petition to deny filed June 30, 1972 by Concern Communicators and a second "Motion to Strike" filed by CBS on November 1, 1972 against the Whittaker Reply pleading, the latter pleading was filed September 19, 1972. Other related pleadings from Whittaker petitioners, CBS and Metromedia, Inc., licensee of WIP-AM and WMMR-FM, Philadelphia, Pennsylvania were resolved by the Commission on September 19, 1972; see *Columbia Broadcasting System, Inc.*, 37 FCC 2d 181 (1972).

be discussed in detail below. However, before reaching the merits of the petitions, several threshold procedural questions must be considered.

1. PROCEDURAL MATTERS

4. Initially, it is observed that CBS, on July 17, 1972, filed a "Motion to Strike" Concern Communicators' petition to deny maintaining that WCAU–TV was not served with a copy of the petition until July 7, 1972, and that WCAU–AM–FM were not served with a copy of the petition. In view of petitioners' apparent failure to comply with the service requirements of Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 309(d)(1), and Sections 1.47(b) and (g) of the Commission's rules, 47 C.F.R. 1.47(b), (g), the Chief, Broadcast Bureau, by letter dated August 1, 1972, advised Concern Communicators that its petition appeared to be legally defective and, thus, would be considered as an informal objection filed pursuant to Section 1.587 of the Commission's rules, 47 C.F.R. 1.587. The Chief, Broadcast Bureau also invited Concern Communicators to comment on this decision since it was made in the absence of any opportunity for petitioners to respond to CBS' motion. Thus, the Chief, Broadcast Bureau noted that the decision would be reviewed to determine whether the pleading should be considered as a petition to deny should facts be brought to the Commission's attention which would indicate that it was timely served. No such comments have been filed. Accordingly, we hold that the petition to deny is legally defective under the provisions of Section 309(d)(1) of the Communications Act and our implementing rules.

5. In addition to being defective due to its late filing, CBS maintains that the petition contains affidavits which raise questions as to Concern Communicators' standing as a bonafide party in interest to a license renewal proceeding.[2] More specifically, CBS notes that several of the affidavits attached to the petition are improperly verified, that some of the other affidavits only purport generally to relate to the allegations contained in the petition, and that one affiant withdrew his affidavit since he was unaware that the statement he signed would be associated with the instant petition. Section 309(d)(1) of the Act provides that where a petition to deny is filed it must be supported by affidavit of a person or persons with personal knowledge of the facts set forth in the petition. It is not necessary that the affidavits attached to a petition to deny be couched in any particular words or phrased in any particular manner if they are sufficient to advise the applicant of the particular facts in the petition within the personal knowledge of the affiant. It appears plain, of course, that affidavits are insufficient

[2] CBS in its "Motion to Dismiss and Opposition" filed July 31, 1972 against the Whittaker petition, indicates that Petitioners have not met the jurisdictional "party in interest" requirements of Section 309(d)(1) of the Communications Act of 1934, as amended (Opp. p. 6). While the licensee chooses not "to develop the argument fully at this time," it does cite the following cases in support of its position: *Sierra Club* v. *Morton*, 405 U.S. 727 (1972); *Lodge 1858* v. *Paine*, 436 F. 2d 882 (D.C. Cir. 1970); and *Utility Users League* v. *FPC*, 394 F. 2d 16 (7th Cir. 1968). We are satisfied, based upon a review of Petitioners' statements in support of its standing, that CBS' allegation is without merit based upon past Commission and Court precedent. *Hale* v. *F.C.C.*, 425 F. 2d 556 (D.C. Cir. 1970), *Office of Communications of the United Church of Christ* v. *F.C.C.*, 359 F. 2d 994 (D.C. Cir. 1966) and *Central States Broadcasting, Inc.*, 37 FCC 2d 500 (1972).

under Section 309(d)(1) where the verification of the affiant is only according to the best of the affiants knowledge, information and belief, or true in substance and fact. Here, it appears to us that many of the affidavits express the general and conclusory opinions of the affiants rather than attesting to the accuracy of the factual allegations set forth in the petition. Thus, a proper question may be raised as to the sufficiency of the affidavits, or at least some of them. However, we have chosen to look beyond the apparent procedural deficiencies of Concern Communicators' petition and will consider the matters raised therein in the context of an informal objection filed pursuant to Rule 1.587.

6. On November 1, 1972, CBS filed a "Motion to Strike" selected portions of the Whittaker reply pleading finding that petitioners "had raised several new matters heretofore not in issue." CBS argues that such new allegations, raised improperly in a reply pleading, should be stricken by the Commission according to the Commission's rules (Section 1.45(b)) and past decisions. *Oklahoma Press Publishing Co.*, 1 FCC 2d 952 (1965), *Chicagoland TV Co.*, 4 RR 2d 747 (1965) and *Media, Inc.*, 22 FCC 2d 886 (1970). After recounting the three new issues, CBS proceeds to counter each of the allegations with further allegations of its own. CBS then concludes by stating that should the Commission not grant its motion to strike, that the Commission consider the "pleading in conjunction with the CBS Motion to Dismiss dated July 31, 1972." Both our rules (47 C.F.R. §§ 1.45(b) and 1.106(h)) and recent decisions (*Scripps-Howard Broadcasting Co.*, 26 FCC 2d 824 (1970) and *Industrial Business Corporation*, 40 FCC 2d 69 (Review Board 1973)) hold that a petitioner will not be permitted to attempt to cure an otherwise defective petition where information contained in its reply was readily available and could have been included in the original petition. As the court stated in *Valley Telecasting Co., Inc.* v. *F.C.C.*, 338 F. 2d 278 (D.C. Cir. 1964) with respect to late filed pleadings it "cripples any decision making process and handicaps any agency in carrying out its functions." However the court has also stated:

> The whole thrust of modern pleading is towards fulfillment of a notice-giving function and away from the rigid formalism of the common-law. It is now generally accepted that there may be no subsequent challenge of issues actually litigated, if there has been actual notice and adequate opportunity to cure surprise.

Kuhn v. *C.A.B.*, 183 F.2d 839, 841–42 (D.C. Cir. 1950). By allowing any new matter and additional pleadings, we would be serving notice that our rules can be effectively ignored. Nevertheless, we recognize that the substantive issues raised by the pleadings bear on the public interest and that, notwithstanding their motions to strike, CBS has responded to the allegations made by petitioners. We find, therefore, that the rights of the parties have been protected. In addition, under the circumstances presented by this case (i.e., our consideration of the instant pleadings comes more than eighteen months after the expiration date of the last license term), we conclude that the orderly administration of the Commission's processes has not been thwarted. *Taft Broadcasting Company*, 38 FCC 2d 770, 771 (1973). Accordingly, in an effort to achieve both fairness and completeness of the record

before us, we have decided to deny the motion to strike and will consider petitioners' total reply pleading along with the allegations of fact submitted by CBS in its "Motion to Strike."

II. ASCERTAINMENT

7. Concern Communicators maintain that CBS has failed to adequately ascertain the needs and interests of Blacks residing in the Philadelphia area. Petitioners submit that CBS relied on community leader luncheons and public service announcements (PSA's) in ascertaining the needs and interest of the Philadelphia area; that these methods were "inadequate and invalid" and completely unsatisfactory for finding out the true needs and interests of the Black community; that Black attendance was low at the luncheons; and that those Blacks who did attend the luncheons reported that those events were mere formalities and unproductive in terms of ascertaining problems of the Black community.[3] Petitioners also assert that a majority of the PSA's aired over the WCAU stations do not deal with the local community problems;[4] that the station's PSA's were either nationally oriented or failed to discuss local Black problems; and that PSA's aired for the Black community "are virtually non-existent." Accordingly, petitioners conclude that the community leader luncheons and PSA's failed to provide CBS with meaningful and useful information about the area's Black community.[5]

8. CBS, in response, initially disputes petitioners' allegation that community leader luncheons and public service announcements constituted its sole community ascertainment methods. Rather, CBS maintains that it closely followed the guidelines for ascertaining community needs as set out in the Commission's *Primer on Ascertainment of Community Problems*, 27 FCC 2d 650 (1971); and, accordingly, submits that individual consultations by station management personnel with community leaders constituted the "primary method by which community problems were ascertained." In this respect, CBS submits that of the 458 and 290 community leaders ascertained in connection with the WCAU–TV and WCAU–AM–FM renewals, respectively, only 38 were interviewed at community leader luncheons, 27 by WCAU–TV management personnel and 11 by WCAU–AM–FM management personnel.[6] In addition to face-to-face personal interviews with community leaders, CBS points out that the needs and interests of its service area have continually been ascertained through management participation in civic organizations, discussions with leaders and potential political candidates who participated in station broadcasts, review of local newspapers, and by helping local community groups prepare their public service campaigns. With respect to the PSA as-

[3] Petitioners allege that three of the Black community leaders on WCAU–AM's list of contacted individuals "have stated that they were not contacted by WCAU–AM." (Pet. p. 7)

[4] Petitioners also assert that only national PSA's are broadcast during prime time.

[5] Petitioners also argue that the licensee in its renewal applications lists several community leaders who could not be reached and that of these persons, 86% were Black community leaders who in actuality could have been reached and that these persons would have provided CBS with meaningful information.

[6] In this connection, the licensee strongly maintains that all persons listed in the application as having been interviewed as community leaders were, in fact, so interviewed, and categorically denies Petitioners' unsupported allegation.

certainment method, CBS states that petitioners are incorrect in stating that the WCAU stations merely listened to these announcements in an effort to ascertain community needs and interests and that local PSA's for the Black community were "non-existent." CBS points out that its renewal applications lists several local Black community groups for whom the WCAU station assisted in preparing PSA's and that the preparation of these announcements enabled the individual station to learn more about the organization's purposes as well as its members' perceptions of the major community problems. Additionally, CBS notes that many of its PSA's broadcast during the composite week, as well as during the whole license term, were of interest to and designed for the area's Black community. CBS concludes [7] that its ascertainment efforts achieved the standards set down in the *Primer*, *supra*, and that petitioners' allegations, containing a singular lack of factual material raise no substantial or material questions of fact that would necessitate a hearing for their resolution.

9. Philadelphia, with a 1970 population of just under two million, is the fourth largest city in the United States. Among Standard Metropolitan Statistical Areas (SMSA's) in the country, Philadelphia's SMSA is fourth largest with nearly five million people in 1970. Between 1960 and 1970, the city of Philadelphia decreased in population by 2.6%, while the SMSA increased 11% over 1960. In 1970, Blacks comprised 33.6% of the city's population and 17% of the SMSA. In the renewal application, CBS states that it serves the metropolitan Philadelphia area including the City of Philadelphia, the Pennsylvania counties of Bucks, Chester, Delaware and Montgomery; the New Jersey counties of Camden, Burlington, and Glouster, and the Delaware county of Newcastle.

10. The guidelines regarding a licensee's obligation to conduct a community survey are set out in our *Primer on Ascertainment of Community Problems by Broadcast Applicants*, *supra*. Briefly, an applicant must first determine the composition of its community and then consult with a representative cross-section of community leaders and a random sample of members of the general public to ascertain problems, needs and interests. Based on its findings, the applicant must list all non-frivilous problems ascertained and propose programming to meet a number of those problems.

11. Here, CBS has determined the composition of its service area, consulted with a representative cross-section of community leaders, and had a general public survey conducted for it by a professional research organization. Also, a review of the application discloses that CBS has submitted an extensive list of problems ascertained and, based on its evaluation of those problems, proposed programming to meet a number of those problems ascertained.

12. While it is true, as petitioners note, that CBS ascertained community needs through luncheons, it is also true that these luncheons constituted only a small portion of CBS' various methods of community ascertainment. In addition to a general public survey, CBS management personnel met with and interviewed 452 individual com-

[7] CBS finds that Petitioners' allegation that 86% of a group of potential community leaders were Black and could have been contacted by the licensee, is an attempt to "denigrate" the ascertainment survey but that a complete review of the renewal exhibits "refutes Petitioners false assertion."

munity leaders in connection with the WCAU–TV renewal application (136 of whom were Black leaders—30%) and 290 individual community leaders in connection with the WCAU–AM–FM renewal application (90 of whom were Black leaders—31%). While petitioners have alleged that three of WCAU–AM community leaders were not in fact contacted by CBS, petitioners have neither substantiated this allegation with personal affidavits, nor indicated in any way who these three persons are. See *Storer Broadcasting Co.*, 41 FCC 2d 792 (1973) and *Time-Life Broadcast, Inc.* (KLZ–TV), 33 FCC 2d 1081 (1972). Thus, we conclude that this allegation fails to raise a substantial and material question of fact.[8]

13. Likewise, even if we were to accept petitioners allegations as true and hold that the luncheons and PSA methods failed to adequately ascertain the needs and interests of the community, and especially the Black community, we are not prepared to hold that such a decision raises substantial or material questions of fact surrounding the licensee's *total* ascertainment effort as set forth in its renewal applications. Indeed, our review of CBS' total ascertainment methods indicates that not only has the licensee adequately surveyed the area's community leaders and members of the general public, but also that petitioners allegations reveal an insufficient examination of the total renewal application for each station; and, in this respect, petitioners' allegations that CBS conducted its community survey by solely conducting luncheons and listening to PSA's is totally without factual support from the exhibits in the renewal applications.

14. More specifically, the renewal applications for each station lists several other continuing methods employed by CBS to ascertain community needs and interests, namely: personal interviews with political candidates and community leaders appearing on station broadcasts; news personnel contacts with leaders in the tri-state area; management involvement in many community organizations; dialogues established with station editorials and editorial replies; preparing and broadcasting local community public service announcements; information from correspondents; general public surveys and various area newspapers and periodicals received by the station. Additionally, since WCAU–AM utilizes an all news and talk format, information gathered and broadcast throughout the broadcast week necessarily added to the station's knowledge of community needs and interests. These continuous community contacts when used, as here, to supplement a formal community ascertainment survey, has been found to be a valuable means of keeping abreast of changing community problems. *WKBN Broadcasting Corp.*, 30 FCC 2d 958 (1971). Accordingly, upon complete review of the licensee's total survey results, we hold that CBS exercised its discretionary judgment adequately in seeking out representative community leaders and members of the general public, and in analyzing the results of those surveys in determining the needs and interests of the area. The fact that petitioners have challenged

[8] As noted above, the licensee personally interviewed a large percentage of Black community leaders, whose qualifications as "community leaders" were not challenged by Petitioners. Also, whether one centers on the city of Philadelphia or its SMSA, the licensee's community leader survey containing over 30% Black leaders certainly can not be challenged as an inadequate representation of the Black community given the racial composition of the licensee's service area.

certain of CBS ascertainment methods will not, in this case, constitute an issue which must be resolved in a hearing. In short, we hold that CBS ascertainment of the needs and interests of the Philadelphia community was properly conducted and reasonably reflected an adequate exercise of its discretion.

III. PROGRAMMING

15. Petitioners begin by enumerating many of the problems facing the Black community in Philadelphia and find that the licensee's programming amounts to "less than a token gesture in helping an exploited, problem ridden community." While petitioner acknowledges that past license renewal applications indicate that the licensee was aware of the many needs and interests of the area listeners, petitioners argue that the WCAU stations' composite week programming contained no broadcasts specifically designed to "deal with any problems facing the Black community;" that the stations' news programming failed to cover the Black community; that the public affairs programs similarly failed to speak to problems of this community; and, even though Blacks constitute "a large amount" of the stations' listeners, the WCAU stations "propose no programming to adequately serve the taste, needs, and interests of the Black community." Finally, petitioners assert that the licensee's on-the-air news personnel often "inject their personal feelings into the facts of [the] news by facial expressions, phraseology, and inflection of the voice," which results in news distortion and factual misstatements. In sum, petitioners conclude that the programming of the WCAU stations has failed to serve the public interest due to its disregard for the area's Black community.

16. CBS, in response, argues that the great bulk of its public affairs programming aired during the license period indicates its commitment to informative programming directed to local community needs and interests, including the many needs and interests of the Black community as mentioned by petitioners. CBS lists several of its programs that were designed to treat many of the contemporary problems of the Philadelphia area and indicates that the variety of community leaders who participated in these broadcasts, along with the various formats employed to communicate the programs' message, rebuts any alleged programming deficiencies raised by petitioners against the WCAU stations license renewal. Further, CBS challenges as inaccurate many of petitioners factual allegations concerning the WCAU stations' composite week programming. The licensee points out that petitioners, in many instances, misread the stations' program logs, for their allegations bear no reasonable relationship to the facts. On several of the days in the composite week, CBS notes that contrary to petitioners' allegations public affairs programming was aired wherein community problems were discussed, and that in many instances local and Black oriented PSA's were broadcast. While CBS disputes the fact that nationally oriented PSA's dominate the programming of the WCAU stations, they argue that these national PSA's touch "on subjects of interest to WCAU [stations'] viewers regardless of race, color, or creed." Additionally, the licensee maintains that WCAU–FM devotes 75% of its public service time to local

organizations that serve the Philadelphia community. CBS steadfastly adheres to the position that a complete review of its renewal application, not a narrow inaccurate focus on its composite week, reveals that many of the problems facing the Black community have received "extensive treatment" in the stations' programming.

17. Finally, CBS dismisses as wholly without foundation petitioners "generalized criticisms and subjective judgments" regarding the WCAU news teams' on-the-air delivery and maintains that petitioners fail to support its conclusions that the licensee does not report the news as objectively as possible. Absent specific, extrinsic evidence of deliberate news distortion or slanting, CBS argues that the Commission should not question the reasonableness of the licensee's broadcast discretion. The licensee concludes that no inquiry into the news broadcasts of the WCAU stations is warranted since petitioners "have failed to present one iota of objective evidence to support their allegations."

18. We have often held that for a licensee to merit renewal of its license, there must be exhibited a showing that during the license period the station's programming was responsive to the community problems, needs and interests as ascertained by the licensee in its survey of community problems. *Storer, supra.* We, of course, must review the licensee's "responsiveness" and in so doing we adhere to the standard of reasonableness and accord the licensee wide discretion in its choice of programming. *The Evening News Association*, 35 FCC 366 (1972). We will not deny license renewal upon a showing from a challenger that amounts to a subjective determination of what is or is not a "good program." That is, neither the Commission nor a petitioner can act as a board of censors over a program broadcast by the licensee. 47 U.S.C. § 326; *Central States Broadcasting, Inc.*, 37 FCC 2d 500 (1972). There exists no obligation that the licensee divide its programming so as to reflect the exact racial, ethnic, or religious composition of its city of license. *WKBN Broadcasting Corp., supra.* Many types of programs cannot be broken down into minority or majority oriented. Indeed such a policy would constitute a doctrine of segregation. *Time-Life Broadcasting, Inc. (KLZ–TV), supra.* and *Capitol Broadcasting Co.*, 38 FCC 1135 (1965). Our granting the licensee wide discretion in programming matters takes cognizance of the fact that not all problems ascertained merit or can be dealt with through the station's programming; and, therefore, we focus our attention on an analysis of the station's *overall* programming performance. The United States Court of Appeals has accurately summarized our role as a reviewing governmental agency and the licensee's role in serving the public interest by stating that:

> How a broadcast licensee responds to what may be conflicting and competing needs of regional or minority groups remains largely within its discretion. It may not flatly ignore a strongly expressed need; on the other hand, there is no requirement that a station devote 20% of its broadcast time to meet the need expressed by 20% of its viewing public. Until this problem is addressed in a rule-making procedure, the scope of F.C.C. review remains whether the licensee has reasonably exercised its discretion. *Chuck Stone* v. *F.C.C.*, 466 F.2d 316, 328 (D.C. Cir. 1972).

19. The Court in *Stone, supra.* also set forth guidelines for members of the public who wished to petition to deny the license renewal of a

broadcast facility: in order to make a prima facie case for renewal denial, Petitioner must submit specific allegations of fact, which if true, would establish that the licensee's overall past and/or proposed programming did not, or will not, reasonably meet the needs and interests of the persons within the station's service area, including Black and other minority communities, and/or that the proposed programming is clearly inadequate to meet those needs and interests. *Ibid.* at 322. Sections 309(d)(1) of the Communications Act of 1934, as amended and 1.580(i) of our rules specifically require that a petition to deny contain "specific allegations of fact" supported by "affidavit of a person or persons with personal knowledge thereof." The allegation of ultimate conclusory facts or mere general allegations or information and belief supported by general affidavit have been found to be insufficient to deny renewal. *Chronicle Broadcasting Co.*, 27 RR 2d 1037 (1973); *Time-Life Broadcast, Inc. (KLZ–TV)*, *supra*. Accordingly, the licensee is entrusted with wide discretion in determining the problems to be addressed by its station and in the choice of programming to meet those problems. *WGN of Colorado, Inc.*, 35 FCC 789 (1972). Without a *prima facie* showing that the licensee has abused its discretion in either determining the problems to be met or in selecting the programs to meet community problems, no substantial or material question of fact is presented which would require a hearing. *WSNT, Inc.*, 27 FCC 2d 993 (1971). Such a *prima facie* showing should illustrate through affidavit that the licensee failed to meet a substantial number of problems in its programming or that it refused in bad faith to meet a significant community problem.

20. After careful review of all the renewal exhibits submitted with the subject application, we hold that CBS has not exhibited an overall abuse of its discretion in its programming to meet the ascertained needs and interests of the Philadelphia service area. We further hold that petitioners objections lack the requisite specificity and are largely conclusory in nature. Their allegations are not tied to specific programming deficiencies and where they are so tied, run the risk of demanding that this agency become a board of censorship. An examination of the illustrative and proposed public affairs programs listed in each renewal application indicates to us that the WCAU stations have and propose to broadcast programs that clearly address themselves to community problems, including specific programs designed to meet the needs and interests of the Black community. That petitioners may regard certain individual programs as irrelevant to the interests of Blacks does not raise an issue justifying our intrusion, *WOIC, Inc.*, 39 FCC 2d 355 (1973); see also *Mahoning Valley Broadcasting Corp.*, 39 FCC 2d 52 (1972) and *Time-Life Broadcast, Inc.*, 33 FCC 2d 1099 (1972). Petitioners also fail to point out that the licensee has either omitted a substantial number of significant community problems in its programming or that CBS refused in bad faith to meet significant community problems or, finally, that it followed a pattern of program exclusion. In this regard, petitioners allegations centering on PSA's broadcast or not broadcast during specific time periods in the licensee's composite week, even if true, do not raise substantial questions regarding the licensee's programming to meet community needs and interests. Moreover, a review of the composite week programming logs sustains

the licensee's remarks in its opposition pleading that petitioners are, in some instances, inaccurate in their allegations of fact: Black-oriented PSA's were broadcast during the composite week as were public affairs programs designed to treat a variety of community needs and interests, including needs of the Black community. Finally, regarding the allegation that the WCAU news personnel "inject their personal feelings into the facts of [the] news", we have repeatedly stated that intervention by this agency in such areas of programming will not be attempted absent extrinsic evidence of deliberate distortion. Here, there are not specific facts offered in support of petitioners allegations, and without this necessary supporting evidence, we will not set for hearing such an issue.

IV. EMPLOYMENT

21. Concern Communicators charge that the WCAU stations have "intentionally overlooked" the "reservoir of qualified talent in the Black community", with the result that station employees are overwhelmingly white and male in all job categories save "service workers." Petitioners allege, for instance, that a Black broadcast school graduate, Mr. Ronnie Skipper, was told by CBS that no positions were available at the WCAU stations even though the licensee maintains a training program for qualified minority persons. Petitioners conclude that while this person "already had some degree of training," he was not "good enough" for the licensee and his not being hired was further evidence of the stations discriminatory hiring practices. Petitioners continue by indicating that CBS's employment statistics "perpetuate racism" at the WCAU stations, notwithstanding the licensee's praise for is own minority employment programs. Further, based on its analysis of CBS's employment profile, petitioners submit that CBS's employment statistics, standing alone, represents discriminatory employment practices, particularly in a community where 33.6% of the population is Black.

22. Similarly, the Whittaker petitioners maintain that its petition together with supporting affidavits and exhibits, raise substantial and material questions of fact concerning CBS' equal employment record which should warrant "independent scrutiny of each station's [renewal] application and of its employment policies as well as an inquiry into the causes and effects" of the licensee's alleged discriminatory practices. Petitioners submit that the Commission's equal employment opportunity rules have set as a goal a "pragmatic, *result oriented* commitment of resources [by licensees] . . . attuned to the 'spirit'—not just the letter—of our national policy of equal employment practices." Employment statistics, argue petitioners, have been found by the Commission to be useful as indicators of a licensee's noncompliance with the Commission's equal employment opportunity rules. *Report and Order in Docket 18224*, 23 FCC 2d 430 (1970). Additionally, petitioners contend that statistics alone are sufficient to establish a case of racial discrimination by an employer. *Brown* v. *Gaston County Dying Machine Co.*, 457 F.2d 1377 (4th Cir. 1972); *Bing* v. *Roadway Express Inc.*, 444 F.2d 687 (5th Cir. 1971); *Jones* v.

Lee Way Motor Freight, Inc., 431 F.2d 245 (5th Cir. 1970) *cert. denied* 401 U.S. 954 (1971).

23. Focusing on the results of CBS's equal employment opportunity policies [9], petitioners find that at the WCAU stations Blacks hold a disproportionate share of the "menial" job positions: in WCAU–AM–FM's 1972 Form 395 nine of the seventy employees were Black, but four of the Blacks held "menial" positions (i.e., office/clerical); and similarly at WCAU–TV of the 35 Blacks employed out of 282 persons, 24 Blacks were in "menial" positions (i.e., office/clerical or service workers). Further, petitioners state that they have no reason to assume that any efforts are being made to increase over-all Black employees or to up-grade Blacks currently employed.

24. CBS, in opposition, maintains that Concern Communicators conclusions on the WCAU stations' employment record are without basis in fact. CBS further submits that petitioners allegations that it "intentionally overlooks" qualified Black talent in the area plants a "false implication" that CBS does not seek out qualified Blacks and other minorities. CBS stresses that the WCAU stations' "Affirmative Action Plan for Minorities and Women" is designed to "prevent racial considerations from influencing hiring and promotion practices." Additionally, the licensee compares Petitioners employment figures with those contained in FCC Form 395 (the Annual Employment Report) for each of the WCAU stations and charges that petitioners have committed "glaring mistakes" in their review of CBS employment data. CBS also points out that Black employment at the WCAU stations has steadily increased. Thus, CBS notes Black employees as a percentage of all employees at WCAU–AM–FM increased 59% from 8.2% in 1971 to 13.0% on June 30, 1972. Similarly, for WCAU–TV, there was a 35% increase from 11.7% to 15.8%. Focusing on Black non-menial employees as a percentage of all employees, WCAU–AM–FM exhibited a 65% increase and WCAU–TV increased 75%. Finally, for Black non-menials as a percentage of all non-menial employees, WCAU–AM–FM had a 55% increase with WCAU–TV recording a 76% rise. These figures coupled with the data contained in FCC Form 395, CBS figures, show that the WCAU stations "have a far greater percentage of Black employees who are in non-menial job categories than is true, on average, in the Philadelphia SMSA or the Philadelphia Area SMSA."

25. Petitioners reliance on inaccurate statistical data alone, argues the licensee, is not sufficient to raise a substantial or material question of fact surrounding the WCAU stations employment record. Petitioners have offered no evidence of specific discriminatory employment practices, CBS alleges, and, in terms of job placement of Black employees, the licensee argues that the "WCAU stations have done far better than the average Philadelphia employer." In sum, CBS finds petitioners without authority to support its employment allegations surrounding the WCAU station, and, accordingly, submits that there

[9] Petitioners note that the WCAU stations' renewal does contain detailed equal employment opportunity programs and policies while 22 of the 28 stations petitioned "submitted what amounted to [a] summary of Section VI without any significant addition of detail." However, petitioners allege that CBS should have a more "aggressive and comprehensive [equal employment opportunity] program to assure equal employment at their stations" than is indicated by their actual employment statistics since the WCAU stations are among the large, wealthier Philadelphia outlets. *Report and Order in Docket 18224, supra* at 433.

exist no material or substantial questions of fact which would require a hearing.

26. CBS, in its opposition to the Whittaker petition advance arguments similar to those noted above in connection with the Concern Communicators petition. Additionally, CBS submits that it is unrealistic for the petitioners to focus on the city of Philadelphia when analyzing employment figures since the WCAU stations encompass a much broader area extending beyond the city limits. CBS argues that its EEO policies are consistent with the Commission's rules and the Commission's language in the *Report and Order in Docket 18224*, supra, at 433 as cited by petitioners.[10] Moreover, CBS contends, even if petitioners were correct in their interpretation of the Commission's EEO requirements, they are incorrect in their conclusions based on the WCAU employment facts: petitioners' own data illustrates a higher percentage of Blacks employed at the WCAU stations than the average of 22 other Philadelphia stations and the WCAU stations have a higher percentage of Blacks in non-menial positions than these same 22 stations. CBS concludes by stating that while statistics may in fact raise valid questions of a licensee's equal employment practices, the WCAU statistics and its EEO programs and policies fail to raise substantial or material questions of fact necessitating an administrative hearing on the issue of employment discrimination.

27. In reply, the Whittaker petitioners initially focus on the disparity between white and black employees at the WCAU stations in the upper four job categories on the 1972 Form 395 (i.e., officials/managers, professionals, technicians, and sales workers) maintaining that of the 49 officials/managers employed by CBS, only one is Black (a female at WCAU–TV), and that of the 54 professionals at WCAU–TV, only three are Black. Petitioners further point out that 71% of WCAU–TV's white employees (176 out of 246) are in the upper four job categories while 70% of the Black employees (24 of 35) are in the lowest job categories ("office/clerical and service workers").[11] At WCAU–AM–FM, petitioners point out that 91.1% of the employees in the upper four job categories are white (51 out of 56), while 8.9% of these employees are Black (5 out of 56).

28. Petitioners conclude by repeating their earlier point that violations of equal employment rules should not be "dependent upon complaints of specific discriminatory practice," rather that the focus should be on the consequences of employment practices and not merely on an employer's motivation. *Griggs* v. *Duke Power*, 401 U.S. 424 (1971). Employment discrimination is not limited solely to "particularized acts directed against specific persons" petitioners argue; and further, employment discrimination must also be viewed in terms of "systematic patterns of exclusion." Petitioners urge that a statistical analysis is a valid method for proving the existence of a discriminatory policy or practice against a class of persons. Under the "rule of exclusion", *Norris* v. *Alabama*, 294 U.S. 587 (1935), petitioners argue

[10] CBS argues that in this Report and Order the Commission was not requiring a larger percentage of minority employees for the larger stations than the smaller ones, but that the station's EEO policies should vary in comprehensiveness according to the station's size and wealth. CBS maintains that its EEO policies are consistent with this language.

[11] At WCAU–TV, petitioners argue, the thirteen Black "service workers" represent 62% of all the "service workers" in Philadelphia and these thirteen Black persons represent 37% of the station's Black employees.

that such a discriminatory policy or practice is proven when plaintiff shows the disparity between the percentage of a particular class in the relevant population sample as compared with the percentage of this class serving on juries (*Turner* v. *Fouche*, 396 U.S. 346 (1970), attending a particular school (*U.S.* v. *Hinds County School Board*, 417 F.2d 852 (5th Cir. 1969)), or in the electorate (*State of Alabama* v. *U.S.*, 304 F.2d 583 (5th Cir. 1962)). Petitioners further argue that in employment cases, a showing that a "preponderance of minorities in lower paying and inferior jobs establishes a prima facie case of discrimination, shifting the burden of proof to the employer to explain any disparity. See, e.g., *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (5th Cir. 1970); *U.S.* v. *Hayes International Corp.*, 415 F.2d 1028 (5th Cir. 1969)." (R. p.17). Thus, argue petitioners, under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000, *et seq.*, plaintiff need not prove discrimination, he need only raise a *prima facie* case of discrimination by showing the exclusion or gross underrepresentation of a protected class and that members of that class are in lower paying, inferior jobs on a disproportionate basis. Then the employer has his burden of demonstrating that discrimination is not a cause of this apparent disparity. "A complainant alleging employment discrimination under the F.C.C.'s equal employment rules has no greater burden than any other movant." (R. p.17). Petitioners conclude with the argument that they have alleged a *prima facie* case of employment discrimination by the WCAU stations and, accordingly, the burden is now on CBS to explain in a hearing their employment policies and practices.

29. As noted above, the approach taken by both petitioners depends on statistical inferences alone,[12] their position being that CBS employs a non-proportionate number of minorities and that those minorities who are employed at the WCAU stations primarily occupy the lower paying, "menial" positions. It is, of course, well established that the Commission has:

> * * * at no time indicated that "fully proportional" employment of minority groups is called for by our rules, since we do not believe that fair employment practices will necessarily result in the employment of any minority group in direct proportion to its numbers in the community. *Report and Order, Docket No. 18244*, 23 FCC 2d 430 (1970).

In accord with this position, the Commission has consistently maintained that non-proportionate minority group employment at a station, standing alone, does not present an issue warranting exploration in an evidentiary hearing. See, e.g., *The Evening News Association*, 35 FCC 2d 366 (1972). In certain Commission cases, the courts have also recognized that nonproportionate minority group employment at a station does not necessarily evidence discrimination requiring an evidentiary hearing. See, e.g., *Chuck Stone* v. *Federal Communications Commission*, 466 F.2d 316, *rehearing denied*, 466 F.2d 331 (1972). See also *Avco Broadcasting Corporation*, 39 FCC 2d 4 (1972), *affirmed sub*

[12] Petitioners are without examples of any persons allegedly discriminated against because of race. The allegations that surround the efforts of Mr. Ronnie Skipper to gain employment at the WCAU stations hardly raises a substantial question of fact warranting exploration in a hearing. Petitioners have failed to present us with facts that would indicate that positions were available at the time Mr. Skipper sought employment and that his not being hired is directly related to discriminatory practices of CBS.

nom., The Bilingual Bicultural Coalition of Mass Media, Inc. v. *Federal Communications Commission*, D.C. Cir., Case No. 72-2205 (Feb. 13, 1974), and *The Outlet Company*, 38 FCC 2d 355 (1972), *affirmed sub nom., The Bilingual Bicultural Coalition of Mass Media, Inc.* v. *Federal Communications Commission*, D.C. Cir., Case No. 73-1001 (Feb. 22, 1974). We realize, as petitioners argue, that statistics can raise appropriate questions requiring administrative action and, accordingly, the Commission has proceeded on this basis in a number of cases. See, e.g., *Inquiry Into the Employment Policies and Practices of Certain Broadcast Stations located in Florida*, FCC 74-18 (January 10, 1974).[13] However, the facts and statistics presented in this matter plainly demonstrate that CBS's employment of minorities falls within a range of reasonableness and that the licensee has otherwise followed practices to improve the employment status of minorities.

30. As previously noted, in 1970 Blacks comprised 33.6 percent of Philadelphia's population and 17 percent of the Philadelphia SMSA. In 1971 WCAU-AM-FM employed 73 persons, including 6 Blacks and 1 Spanish-Surnamed American, and WCAU-TV employed 316 persons, including 37 Blacks and 1 Spanish-Surnamed American. Thus, minorities represented 9.6 percent and 12 percent, respectively, of the licensee's full-time workforce in 1971. In 1972 WCAU-AM-FM employed 70 persons, including 9 Blacks, and WCAU-TV employed 282 persons, including 35 Blacks and 1 Spanish-Surnamed American. Thus, in 1972 minorities represented 12.8 percent and 12.7 percent, respectively, of the licensee's full-time workforce. In 1973 WCAU-AM-FM employed 79 persons including 12 Blacks, and WCAU-TV employed 264 persons, including 43 Blacks, 3 Spanish-Surnamed Americans, and 2 Orientals. Thus, in 1973 minorities represented 15.2 percent and 18.2 percent, respectively, of the licensee's full-time workforce. It is plain, therefore, that minority employment at the CBS stations falls within a range of reasonableness when compared to either the minority population of Philadelphia or the Philadelphia SMSA.

31. With regard to the placement of CBS's minority employees in various job positions, we have previously stated that where, as here, there is no discrimination in filling responsible positions, "* * * we do not believe it is appropriate for us to question the licensee's judgment in determining the number and placement of minority groups in various departments." *The Evening News Association*, 33 FCC 2d 366, 395 (1972). Of course, if a licensee has a very low percentage of minority group employees in relation to their percentage in the area workforce, or if all minority group employees are relegated to the lower paying or menial positions, then a fair question may be raised requiring appropriate administrative inquiry and remedial action. See, e.g., *Letter to Rev. Everett C. Parker re: Massachusetts Television Station License Renewals*, 44 FCC 2d 647 (1947). Here, however, no such question requiring further inquiry and remedial action is presented. A review of CBS's Annual Employment Re-

[13] It is also noteworthy that the Commission's Industry Equal Employment Opportunity Unit is currently reviewing our equal employment opportunity policies and procedures to determine whether new or revised guidelines should be issued to further effectuate the goals of equal opportunity in employment for minorities and women. See *Arco Broadcasting Corporation, supra.*

ports for 1971, 1972 and 1973 discloses that minority group employees occupy other than menial positions and continue to be placed in responsible positions. For example, in 1972 at WCAU–AM–FM three (3) minorities were classified as professionals, one (1) as a technician, one (1) as a salesworker, and four (4) in the office and clerical category, and in 1973 one (1) minority employee was classified as an official and manager, six (6) as professionals, one (1) as a technician, one (1) as a salesworker, and three (3) in the office and clerical category. In 1972 at WCAU–TV one minority group employee was classified as an official and manager, three (3) as professionals, five (5) as technicians, two (2) as salesworkers, eleven (11) as office and clerical, and thirteen (13) as service workers, and in 1973 four (4) minority group employees were classified as officials and managers, four (4) as professionals, eight (8) as technicians, one (1) as a salesworker, 20 as office and clerical, one (1) semi-skilled operative, and ten (10) service workers. Petitioner's objections to the placement of minority group employees in particular positions in view of the facts recounted above fail to raise a substantial and material question of fact concerning CBS's employment policies and practices.

32. In conjunction with the foregoing, it is noteworthy that the Whittaker petitioners apparently concede that CBS "utilizes virtually every minority organization in town" in search of qualified minority employees and that CBS' equal employment opportunity program "follows the Commission's guidelines closely" (R. p.79a). Nonetheless, the Whittaker petitioners maintain that on the basis of the WCAU stations' employment record, the equal employment opportunity programs are not being lived up to or in fact that these programs could never be realized in practice. We find these allegations unpersuasive. In the first eleven months of 1972, the WCAU stations were in touch with a large collection of community organizations in an attempt to locate and hire qualified minority employees.[14] The actual employment record for the WCAU stations from January to November, 1972 illustrates that CBS has in fact lived up to the representations in their equal employment opportunity programs: the total staff of WCAU–AM–FM increased by seven persons (two were Black and one Black was hired as "Director of News and Public Affairs"); two Blacks currently employed were promoted from office/clerical positions to professional and official/management categories; at WCAU–TV thirty job positions were available in official/management, professional technical and sales worker categories of which fourteen were filled by minorities;[15] and in addition 26 job openings were available in other job categories, eleven were filled with minorities. We have stated that in order to challenge a licensee's equal employment program or show non-compliance with the Commission's

[14] Employment want ads were placed in the *Philadelphia Tribune* (minority oriented newspaper) with no responses. Additionally, CBS was in touch with the Philadelphia Urban League (no candidates referred), the Philadelphia State Employment Agency, Opportunities Industrial Center (one candidate referred and hired), Council of Spanish Organizations (two candidates referred and hired), and Careers, Inc. (two candidates referred and hired).

[15] Included among these positions are the Manager of Community Relations, the Director of Broadcast Operations (one of the four key management positions under the General Manager), the Sales Traffic Manager, two staff producers, an account executive, six technicians and two staffwriters/reporters.

rules, a petitioner must demonstrate with some degree of specificity that the licensee's employment practices in some way prevent equal employment opportunities or that the licensee discriminates in employment. *Time-Life Broadcast, Inc.*, 38 FCC 2d 1050, 1059 (1972). We conclude that petitioners have failed to sustain that burden. Indeed, we are persuaded that CBS employment policies and practices contain no barriers to equal opportunities in employment and that the licensee has exercised good faith in implementing its equal employment program.

33. In conclusion, on the basis of our review of the licensee's renewal applications and the matters discussed herein, we find that both petitioners have failed to raise a substantial and material question of fact which establishes a *prima facie* case for denial of CBS's applications for renewal of licenses for Stations WCAU, WCAU–FM and WCAU–TV, Philadelphia, Pennsylvania. We also find that a grant of CBS's applications for renewal of licenses would serve the public interest, convenience and necessity.[16]

34. Accordingly, IT IS ORDERED, That Columbia Broadcasting System, Inc.'s July 17, 1972 Motion to Strike Concern Communicators' et al. petition to deny IS GRANTED to the extent that said petition is legally defective under Section 309(d)(1) of the Communications Act of 1934, as amended, and the Commission's implementing rules, and IS DENIED in all other respects.

35. IT IS FURTHER ORDERED, That Columbia Broadcasting System, Inc.'s November 1, 1972 Motion to Strike selected portions of the Whittaker petitioners' reply pleading IS DENIED.

36. IT IS FURTHER ORDERED, That Concern Communicators et al. June 30, 1972 Petition to Deny IS DISMISSED and when considered as an Informal Objection IS DENIED.

37. IT IS FURTHER ORDERED, That the July 3, 1972, Janet C. Whittaker et al. Petition to Prevent Continued Violation of [the] Commission's Equal Employment Opportunity Rules IS DENIED insofar as said pleading relates to the above-captioned applications for renewal of licenses for Stations WCAU, WCAU–FM and WCAU–TV, Philadelphia, Pennsylvania.

38. IT IS FURTHER ORDERED, That the above-captioned applications for renewal of licenses for Stations WCAU and WCAU–FM, Philadelphia, Pennsylvania, ARE HEREBY GRANTED, subject to the conditions, and without prejudice to whatever action, if any, the Commission may deem appropriate as the result of final action in: (1) The now pending civil antitrust action in which Columbia Broadcasting System, Inc., is a party defendant (Civil Action File No. 70 Civ. 4202, U.S. District Court for the Southern District of New York); (2) The now pending civil antitrust action in which Columbia Broadcasting system, Inc., is a party defendant (Civil Action File No. 72–820, U.S. District Court for the Central District of California); and, (3) That the defendant shall immediately notify the Commission of the final disposition of each case.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[16] The application for renewal of WCAU–TV will not be resolved at this time due to a competing application filed by *First Delaware Valley Citizens Television, Inc.*

FCC 74-248

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CONNELLSVILLE BROADCASTERS, INC., CONNELLSVILLE, PA. For Renewal of License for Radio Station WCVI	Docket No. 19668 File No. BR-1550

APPEARANCES

Thomas Schattenfield, *Theodore D. Frank*, and *David Tillotson* on behalf of Connellsville Broadcasters, Inc.; *Paul Dobin* and *Joel H. Levy* on behalf of Bernard Stern and Burns Drug Company; *Thomas B. Fitzpatrick*, *P. W. Valicenti*, and *Willian D. Silva* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission; and *William D. Henry* on behalf of The Freedom Committee.

DECISION

(Adopted March 13, 1974; Released March 19, 1974)

BY THE COMMISSION:

1. Administrative Law Judge Basil P. Cooper released an Initial Decision (FCC 73D-65) in this proceeding on December 28, 1973, in which, *inter alia*, he recommended that the license of Connellsville Broadcasters, Inc. for station WCVI be granted for a period not to exceed one year from the date of release of such decision.[1] At the same time, Judge Cooper imposed the following sanctions: (a) that Bernard Stern, an officer and stockholder of Connellsville Broadcasters, Inc., be assessed a forfeiture in the amount of $5,000.00; (b) that for a period of one year from the release of the Initial Decision the licensee shall not broadcast over the facilities of station WCVI any order or message from Bernard Stern or from any of the three Burns Drug Stores owned by the said Bernard Stern; and (c) that for a period of one year from the release of the Initial Decision, Bernard Stern shall on the third Monday of each month mail to the Commission a letter stating his then current phone number and the address at which he can be reached by mail.

2. Joint exceptions to the Initial Decision were filed on January 28, 1974, by Connellsville Broadcasters, Inc., Bernard Stern/Burns Drug Company, and the Chief, Broadcast Bureau (hereinafter referred to as exceptors). No exceptions are taken to the findings of fact made by Judge Cooper. Nor are any exceptions taken to the Judge's conclusion that station WCVI's license should be renewed for a period not to

[1] The regular license renewal period for Pennsylvania stations expires on August 1, 1975.

exceed one year from the date of the Initial Decision. In this connection, Connellsville Broadcasters, Inc. asserts that it ". . . will accept the short-term renewal proposed by the Broadcast Bureau and ordered by the Administrative Law Judge since this will provide the fairest and most expeditious resolution of this proceeding."

3. The exceptors do, however, object to the other sanctions imposed by the Judge which are set forth above. They urge that because such sanctions are clearly outside the statutory power of the Commission action should be taken to conform the Judge's Order to applicable statutory authority, and that such sanctions should be deleted from the Ordering Clauses of the Initial Decision. We agree that the Judge was without authority to impose the sanctions described above. Certainly there is no authority to assess a $5,000.00 forfeiture against Bernard Stern individually, because subsections b(1), (2), and (3) of Section 503 of the Communications Act of 1934, as amended, make clear that the liability for monetary forfeiture attaches to the licensee or permittee, not to an individual stockholder or officer of the licensee or permittee. Moreover, even as to the licensee itself in this proceeding a forfeiture could have been assessed against it only in the light of evidence adduced pursuant to Issue No. 3 herein concerning political announcements made over station WCVI during the period April 19–24, 1972.[2] However, the Judge resolved Issue No. 3 favorably to the licensee, thereby precluding his assessing a forfeiture against the licensee in this connection.

4. It is also correct, as the exceptors urge, that the Judge had no authority to order that the licensee herein not broadcast over the facilities of station WCVI any order or message from Bernard Stern or from any of the three Burns Drug Stores owned by Bernard Stern. Such an order, in its effect, constitutes a clear prior restraint or censorship in violation of Section 326 of the Communications Act of 1934, as amended, and possibly also of the First Amendment. Nor do we find any authority for the Judge's Order that, for a period of one year from the release of the Initial Decision, Bernard Stern shall on the third Monday of each month mail to the Commission a letter stating his then current phone number and the address at which he can be reached by mail.

5. In view of the foregoing, we shall adopt the Initial Decision herein as our own Decision. However, for the reasons which have been set forth above, so much of the conclusions of the Initial Decision as assess a monetary forfeiture against Bernard Stern, prohibit the broadcast over station WCVI of any order or message from Bernard Stern or from any of the drug stores owned by him, and require monthly reports from Bernard Stern shall be deleted. The license of Connellsville Broadcasters, Inc. for station WCVI shall be granted for a period not to exceed one year from December 28, 1973.

6. Accordingly, IT IS ORDERED, That the above-described Initial Decision of Administrative Law Judge Basil P. Cooper IS

[2] By Memorandum Opinion and Order and Notice of Apparent Liability, released April 17, 1973 (40 FCC 2d 678), the Commission revised the designation order herein to include the availability to the Judge of the sanction of monetary forfeiture under Issue No. 3.

ADOPTED except that the following conclusions and Orders therein contained ARE DELETED.

(1) That "Bernard Stern, an officer and stockholder of the applicant corporation, be assessed a forfeiture in the amount of five thousand dollars ($5,000)";
(2) "That for a period of one year from the release of this Initial Decision the licensee shall not broadcast over the facilities of station WCVI any order or message from Bernard Stern or from any of the three Burns Drug Stores owned by the said Bernard Stern"; and
(3) "That for a period of one year from the release of this Initial Decision, Bernard Stern shall on the third Monday of each month mail to the Commission a letter stating his then current phone number and the address at which he can be reached by mail."

7. IT IS FURTHER ORDERED, That the joint exceptions to the Initial Decision, filed January 28, 1974, by the Chief, Broadcast Bureau, Connellsville Broadcasters, Inc., and Bernard Stern/Burns Drug Company ARE GRANTED.[3]

8. IT IS FURTHER ORDERED, That the application (BR–1550) of Connellsville Broadcasters, Inc. for renewal of the license for station WCVI, Connellsville, Pennsylvania, IS GRANTED for a period of one year from December 28, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[3] Because the substance of the joint exceptions has been set forth in the text of this Decision, and our rulings thereon are apparent, it is unnecessary to attach an Appendix containing such rulings.

FCC 73D–65

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CONNELLSVILLE BROADCASTERS, INC., CONNELLSVILLE, PA., For Renewal of License for Radio Station WCVI	Docket No. 19668 File No. BR–1550

APPEARANCES

Thomas Schattenfield and *Theodore D. Frank*, on behalf of Connellsville Broadcasters, Inc.; *Paul Dobin* and *Joel H. Levy*, on behalf of Bernard Stern and Burns Drug Company; *William D. Silva*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission; *William Edward Henry*, on behalf of Freedom Committee.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE BASIL P. COOPER

(Issued December 26, 1973; Released December 28, 1973)

PRELIMINARY STATEMENT

1. In this proceeding Connellsville Broadcasters, Inc., licensee of radio station WCVI, Connellsville, Pennsylvania, seeks the renewal of license of standard broadcast station WCVI, Connellsville, Pennsylvania.

2. By order, FCC 73–25, adopted January 4, 1973, released January 9, 1973, the Commission designated the above-entitled application for hearing upon the following specified issues:

(1) To determine whether the licensee engaged in fraudulent billing practices, or failed to exercise reasonable diligence to see that its agents and employees did not engage in fraudulent billing practices, in violation of section 73.1205 of the Commission's rules.

(2) To determine whether the licensee violated the fairness doctrine with respect to its handling of a controversy surrounding the medical care offered by local hospitals; and to determine whether the licensee's programming policies with respect to medical care offered by local hospitals were designed to protect the private interests of the licensee's president rather than to serve the public interest.

(3) To determine whether the licensee failed to make the necessary sponsor identification announcements in connection with political announcements, in violation of section 317 of the Communications Act and section 73.120 of the Commission's rules.

(4) To determine whether the licensee failed to properly maintain or make available its public inspection file, in violation of section 1.526 of the Commission's rules.

(5) To determine, in light of the evidence adduced under the preceding issues, whether the licensee has the requisite qualifications to be or to remain a licensee of the Commission, and whether a grant of the application would serve the public interest, convenience and necessity.

3. On January 29, 1973, the Broadcast Bureau served a Bill of Particulars upon station WCVI setting forth the information and allegations upon which the designation of Issues 1 through 4, above, are based. In a Memorandum Opinion and Order and Notice of Apparent Liability, 40 FCC 2d 678, released April 17, 1973, the Commission revised the designation order in this proceeding to include the following:

IT IS FURTHER ORDERED, That if it is determined that the hearing record does not warrant an order denying the application of Connellsville Broadcasters, Incorporated for renewal of license for station WCVI, Connellsville, Pennsylvania, it shall also be determined, whether in the light of evidence adduced pursuant to Issue No. 3 in this proceeding concerning political announcements made over station WCVI during the period April 19–24, 1972, Connellsville Broadcasters, Incorporated should be assessed a forfeiture in the amount of $10,000 or some lesser sum pursuant to section 503(b) of the Communications Act of 1934, as amended.

4. The Commission, in revising the designation order, stressed that:

The inclusion of such Notice is not to be taken as indicating in any way what the initial or final disposition of this case should be. That judgment will be made on the particular facts of this case after a full evidentiary inquiry.

In an Order (FCC 73M–1131), released September 28, 1973, the Presiding Judge granted the petition of Bernard Stern to intervene as: (1) himself; (2) as owner of Burns Drug Company; and (3) as a 21.4% stockholder of Connellsville Broadcasters, Inc.

5. Prehearing conferences were held on the following dates: February 13, April 27, June 6, September 11 and October 1, 1973, and the hearing commenced October 9, 1973, in Uniontown, Pennsylvania. Hearing sessions were held October 9, 10, 11, 12, 16 and 17, 1973, and the record was closed November 19, 1973. Proposed findings were filed by Broadcast Bureau on December 10, 1973.

6. The informal request of the Freedom Committee for Commission action pursuant to section 1.41 of the Commission's rules was granted and the Freedom Committee was made party respondent in this proceeding.

7. It was further ordered that the Chief of the Broadcast Bureau shall serve upon the captioned licensee, within thirty (30) days of the release of this order, a Bill of Particulars with respect to issues (1) through (4), inclusive.

8. And that the Broadcast Bureau and the Freedom Committee proceed with the initial presentation of the evidence with respect to issues (1) through (4), inclusive, and that the applicant then proceed with its evidence and have the burden of establishing that it possesses the requisite qualifications to be and to remain a licensee of the Commission and that a grant of its application would serve the public interest, convenience and necessity.

9. The Commission further orderd, that to avail themselves of the opportunity to be heard, the applicant and the Freedom Committee, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall, within twenty (20) days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and present evidence on the issues specified in this Order.

10. The Commission in several sections of its rules calls attention to types of conduct which are deemed to be improper and fraudulent. The fraudulent billing rules, originally described as sections 73.124 (AM), 73.299(FM) and 73.678(TV) are now consolidated as section 73.1205 which reads as follows:

> No licensee of a standard, FM, or television broadcast station shall knowingly issue to any local, regional or national advertiser, advertising agency, station representative, manufacturer, distributor, jobber, or any other party, any bill, invoice, affidavit or other document which contains false information concerning the amount actually charged by the licensee for the broadcast advertising for which such bill, invoice, affidavit or other document is issued, or which misrepresents the nature or content of such advertising, or which misrepresents the quantity of advertising.

11. In simple lay terms the licensee is told to play it straight and refuse to permit the station to be used as a means of perpetrating a fraud upon another.

12. The term "double billing" as used herein refers to those situations wherein the licensee submits (a) an original legitimate bill for services rendered, and (b) without rendering service submits a second bill for a like or lesser amount. Such "double billing" is also fraudulent billing.

13. If the licensee has any doubt as to the legality of his billing practices he should contact his attorney.

FINDINGS OF FACT

Issue 1—Fraudulent Billing Practices

14. In May 1962 Commission inspectors ascertained that Connellsville Broadcasters, Incorporated (WCVI), Connellsville, Pennsylvania, had "double billed" four advertisers, namely: Center Independent Oil Company, Swan General Electric Appliances, Malinzac Gas and Oil Company and Sterbutzel Service. By letter dated November 15, 1962, Dr. Cam T. Troilo, president of the licensee, stated that all double billing practices which had been confirmed by the Commission had been discontinued and that "The Board also has instructed management that there will be no double billing under any circumstances."

15. Bernard Stern owns and operates three drug stores, sometimes referred to as Burns Drug Company, Burns Drug Store, or Burns Drug. He also owns 21.4% of the stock of Connellsville, Inc.

16. Burns Drug Company has been promoted over the Connellsville Broadcasters (WCVI) on a regular basis for many years. Many, if not all, of these spots were properly handled and paid for.

17. During certain periods of the year and in particular during Thanksgiving, Christmas, New Year's, Valentine Day seasons, etc.,

sections of Burns Drug Stores were decorated in a manner suitable for the season and in spot announcements the listener was invited to: (1) visit one or more sections of the Burns Drug Stores; (2) examine the items on display; and (3) purchase items displayed and advertised by specific firms or suppliers. It appears that the manufacturer, the supplier and the distributor were informed of the price of the cooperative spots both before and after they were run and continued to place orders for the cooperative advertising.

18. Loraine Livingston was the bookkeeper at station WCVI for approximately 12 years beginning in 1958 or 1959 until she was discharged on or about December 1970.

19. During the period from March 1968 until September 1, 1968, and from July 1970 to mid-March 1971, Brian MacDonald was employed at station WCVI in several capacities. In late November or early December 1970, Brian MacDonald walked by the desk of Loraine Livingston and noticed an unusually large package of either bills or affidavits of performance. After commenting that the station must be making money, Mrs. Livingston replied, "Oh, I'm doing this for Mr. Stern." MacDonald did not know what he was seeing, but he learned the next day that Mrs. Livingston had been discharged.

20. Prior to being discharged Mrs. Livingston had been responsible for billing advertisers and preparing affidavits of performance. She had also been responsible for handling the Burns Drug account until 1962 or 1963 when Ed Manning told her that he did not want the cooperative advertising to be billed to Burns Drug. Manning would give Mrs. Livingston a copy of radio scripts with a notation telling her how it was to be billed. Mr. Manning is a salaried employee with no ownership interest and no profit sharing arrangement.

21. According to Mrs. Livingston, the Burns Drug Store account was never really serviced. Mr. Manning would call and give her what copy he had. Orders were received on a "Pick up until cancelled basis." When Mr. Manning would call, Mrs. Livingston would go to the Burns Drug Store to pick up copy. Mrs. Livingston prepared the affidavits of performance on order of Mr. Manning.

22. At one time, Mrs. Livingston was preparing the billing correctly, but Manning said, "No, he does not want the bills, just send him the invoices and affidavits as if they were run."

23. Shortly after the events previously mentioned occurred, Mrs. Livingston attended a meeting at which Dr. Troilo, Mr. Calisti, Mr. Manning and Mr. Stern were present. According to Mrs. Livingston, Mr. Stern was denying any misconduct but Mr. Manning commented, "It is all right here, Bernie, I'll show you." He then went into the bookkeeper's office and brought out the ledger.

24. For a substantial period of time, Bernard Stern has been confronted with the charge of allegation that he, through Burns Drug Company, had engaged in double billing and fraudulent billing practices. Although he has employed competent counsel, he has not appeared at any hearing session. He has ignored requests for material. His justification for his conduct has been the fact that he has been ill. His doctors, however, stated that he has been suffering from a serious disease which need not be disclosed in this Initial Decision. It is disclosed at pages 79–80 of the transcript.

25. For several years Bernard Stern has used the Burns Drug Stores, owned by him, in such a manner as to enable him in practices known to the Commission as double billing and fraudulent billing. Bernard Stern is the person primarily responsible for the double billing activities. The other officers, directors, and stockholders are responsible only to the extent that they did not exercise sufficient ingenuity to discover and prevent the double billing activities.

Issue 2—To determine whether the licensee violated the fairness doctrine with respect to its handling of a controversy surrounding the medical care offered by local hospitals; and to determine whether the licensee's programming policies with respect to medical care offered by local hospitals were designed to protect the private interests of the licensee's president rather than to serve the public interest

26. Neither Dr. Troilo nor any of the other officers and stockholders are professional broadcasters. From the beginning they sought to seek out and hire personnel who had had experience in the management and operation of broadcast stations. Many of the new employees were those who had had experience as moderators, master of ceremonies, and announcers.

27. It appears to the Presiding Judge that the officers, directors and stockholders of Connellsville Broadcasters, Inc., and some, possibly all, of the WCVI moderators, announcers, program directors, and others, had read or been told of the Commission's Report and Order in the matter of the ascertainment of community problems (FCC 71–176; 36 FR; 27 FCC 2d 650; 21 RR 2d 1507). Some may have reached the conclusion that the licensee was required to permit any person to use the facilities of station WCVI as long as that use was intended to respond to the needs and problems of the Connellsville, Pennsylvania, area.

28. In the 1969 application for renewal of license of station WCVI, the following commitments are made:

> Applicant will allow any subject of a controversial issue to be discussed over its facilities. We allow equal time to both sides of any controversy. Subjects are selected by station management when we feel the topic they wish to discuss is of importance to a majority of our listeners. Also, the applicant has always extended free time to civic officials and other well qualified individuals for discussions of public issue.
>
> Station has promoted tourism in the area by announcing ski slope reports and general tourist encouragement. We have also encouraged area development in order to remove our "Depressed Area" title. The "Phone Party" program has given the area listeners a good opportunity to express their views on most local issues.
>
> This station encourages persons of responsibility from religious, charitable, public, and service organizations to make themselves available for discussion programs. These persons are selected by station management when we feel the subject they wish to discuss is of the most interest to the majority of our listeners. An opportunity will be given to both sides of a controversial issue. The requirements of the fairness doctrine will be met.
>
> This station plans to continue its policy of promoting tourism in the Laurel Highlands area and to devote as much time as possible to the betterment of an area that is now considered "depressed." Also plans to extend the "phone party" program an additional hour to allow for people to express their opinions.

29. Some, possibly all, of the announcers, moderators, program directors and others, appear to have construed the above-quoted commitments in a literal and liberal manner. In a program originally called "Phone Party," later changed to "View Point," the moderator, Brian MacDonald, invited the listener to either write in or call in and discuss matters of interest to the areas served by station WCVI.

30. Many of the listeners of WCVI who called the station were obviously interested in offering what they considered to be bona fide suggestions for improving the community. Some, however, on learning that station WCVI was being operated with an "open mike" could not resist the opportunity to try to get on station WCVI by means of the "open mike."

31. An "Open Mike" conversation is a conversation between two persons—one who serves as a moderator, or master of ceremonies for the station; the other, any person who manages to gain access to the circuit which puts the message of the calling party on the air. Station WCVI was not equipped with facilities by means of which the moderator, or master of ceremonies, could delay the actual broadcast until it was ascertained that the words to be broadcast did not violate either federal or state laws or the rules of the Federal Communications Commission.

32. In the 1969 renewal application, the licensee made certain commitments (see para. 28, *supra*), but there is nothing in said commitments which denied the licensee the right, power and duty to see that the facilities of the station WCVI were not abused. Nothing in the 1969 renewal commitment required the licensee to make the facilities of station WCVI available to any and all persons who desired to present his or her views over the facilities of station WCVI.

33. Dr. Troilo did not object to the use of the facilities of station WCVI to discuss complaints which had been raised on the Phone Party program in which management and members of the general public had complained of: (1) dirty streets; (2) the need to get young doctors into the local hospitals; (3) delays in getting patients into the hospitals; and (4) the need for better medical service.

34. Due to the interest which was developed when the Phone Party was first broadcast, it was decided to present a program dealing with the Connellsville State Hospital and local health care. Dr. Troilo was instrumental in selecting a panel which consisted of himself, Dr. Driscol, president of the Chamber of Commerce, Dr. Stone and Dr. McClelland, both doctors at the Connellsville State Hospital. The proposal to publicize the program was promoted over the air and people were asked to submit topics or questions in advance either by letter or phone.

35. Persons interested in discussing medical and hospital affairs were invited to either write in or phone in and specify what topics they wished to hear the panel discuss. Dr. Troilo estimated that some 150 topics were received. These topics or questions were turned over to Mary Goodman who eliminated duplicates. Topics or questions not eliminated as duplicates were delivered to the panel consisting of the personnel identified in paragraph 34 above. Some 10–15 minutes before the public program began, the topics or questions were delivered to the panel.

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36. If a topic or question related to a subject in which a member of the panel specialized that question was immediately assigned to that practitioner. The end result was that each topic or question was delivered to and answered by one or more practitioners imminently qualified to comment on or discuss the topic and answer the question.

37. As stated by Bureau counsel, the new format wherein questions relating to hospital management and medical treatment of the sick and infirm were answered by medical practitioners differed from the earlier Phone Party format in which the moderator (see para. 29, *supra*) invited anyone to call in and discuss hospital and medical treatment problems.

38. There is no doubt but that many persons wanted to get on the air to discuss how a Pennsylvania state hospital should be operated and the sick treated. An important question, however, is whether the State of Pennsylvania would consider these many persons to be qualified to advise the ill and the infirm how they should be treated.

39. Many of the listeners of station WCVI, on being told that the questions to be discussed on a specified program which were submitted to the panel before the program began, reached the erroneous conclusion that Dr. Troilo had restricted all discussion relating to the Connellsville State General Hospital.

40. According to several employees who moderated the Phone Party programs, the moderators were instructed to minimize personal comments, to keep the program in good taste, avoid libelous and slanderous remarks on phone calls. Before a story about the hospital was aired, it was to be checked for accuracy with Dr. Troilo or other sources at the Connellsville State General Hospital. These instructions, however, were not followed on all occasions.

41. On one of the "Open Mike" calls, it was stated that a school teacher had beaten a student. Dr. Troilo, on learning what was going on, directed Mrs. Livingston to tell the announcer to keep the name of the teacher and the child off the air. So concerned were the directors with the possibilities which were growing out of the "Open Mike" broadcast that the station took out slander insurance in the amount of a million dollars.

42. It was at or about this time that the licensee informed staff personnel that criticism of the hospital had to be in good taste and that the names of doctors, patients and nurses were not to be broadcast.

43. Dr. Troilo donated much time in efforts to organize a panel wherein qualified doctors, surgeons, eye, ear, nose and throat personnel could answer medical questions. The existence of this panel was promoted on the air and some 150 questions were received (see Para. 34–36, *supra*).

44. Sometime in January 1971, Brian MacDonald was suspended for one week. According to management, he was suspended for failing to follow instructions; according to MacDonald, for criticizing the hospital.

45. Brian MacDonald had many friends and shortly after it became known that MacDonald had been suspended, a number of his friends and others moved into the facilities of station WCVI. The chief of police and the chief of detectives also moved into the station. A con-

frontation was at hand, but, fortunately, for all concerned, peace and tranquility arrived along with coffee and donuts.

46. Brian MacDonald hosted the Phone Party program from March 1968 until March 1971. According to MacDonald: "I was not permitted to discuss anything about the hospital, or, if the hospital was brought up, it was the "unwritten law" not to let any discussion go on the air." It appears from Page 250 of the transcript that the "unwritten law" to which Mr. MacDonald referred, did not prevent persons using the facilities of the station to allege or infer that Miss (identified by name) had appendicitis and died of something else, or broadcast that Dr. C. is a no good (fighting term) or that Dr. T doesn't know anything about medicine. It would appear that the moderator forgot the "unwritten law" while the facilities of station WCVI were being used to broadcast statements which were derogatory of highly respected members of the staff of the Connellsville State General Hospital.

47. Dr. Troilo testified that Dr. Stone has received four critical calls to the hospital saying that the doctors were too old and too decrepit, that they should retire. Every comment was critical, everything derogatory, not only toward the old doctors in town but also against the hospital.

48. In several of the Open Mike discussions, persons advocated the need of residents of Connellsville to: (1) clean up the dirty streets; (2) the admission of younger doctors to the staffs of nearby hospitals; and (3) more rapid and efficient operations of the existing hospital facilities.

49. Dr. Troilo has been associated with the Connellsville State General Hospital since 1936. For the last 10 years he has been president of the staff, chief of surgery, chief of obstetrics, chief of various committees. He is presently on the staff as a surgeon. None of the positions he has held on the hospital staff have been paying positions.

50. In the early 1950's Dr. Troilo joined a group of other residents of the Connellsville area in purchasing station WCVI from the original owners of the Connellsville Daily Courier. He gradually increased his ownership interest and now has 42.8% of the stock of the licensee.

51. According to Dr. Troilo: "We never did stop any criticism of the hospital." He wanted anything directed toward the hospital to be in good taste. He did not want the names of the doctors, nurses and patients to be publicized.

52. On one occasion, Dr. Troilo wanted to discuss the problems of the emergency room at the hospital. Another person, however, wanted to discuss whether the death of a patient may have resulted from the late admission of the patient to the hospital.

53. On March 10, 19--, a young lady died. On the following day one of the principals of the Freedom Committee, Mrs. Geshinsky wanted to discuss the details of the death of this young lady, but she was not given the mike.

Issue 3—To determine whether the licensee failed to make the necessary sponsor identification announcements in connection with political announcements, in violation of Section 317 of the Communications Act and Section 73.120 of the Commission's rules

54. The Commission placed the burden of the initial presentation of the evidence of Issue 3 on the Broadcast Bureau and the Freedom

Committee. Ten (10) announcements ranging from 15 seconds to 60 seconds were offered in evidence. All ten were received as Broadcast Bureau Exhibit #57.

#1 was a 60-second political announcement in which the listener was invited to elect (1) Dull for Mayor; (2) Munson for Councilman; (3) Costello for Controller; (4) Hileman for School Director; (5) Carr for Justice of the Peace; and (6) Truxle for City Council.

#2 was a 15-line, 30-second spot broadcast August 23, 1971, wherein the Bullskin Community Fair was being brought to the attention of the listener by (1) democratic candidates; (2) Lebder and Molinaro, Jr. for County Commissioner; (3) Jaketti for District Attorney; (4) Zimmerman for County Controller; (5) Kornick for County Treasurer; (6) Schroyer for Register of Wills; (7) Magee for County Coroner; (8) Vicites for Clerk of the Courts; (9) Brady for County Prothonotary; (10) Hamilton for Sheriff; and (11) Lebder and Molinaro for County Commissioner.

#3 was a 14-line, 30-second spot broadcast, not dated, wherein the listener was invited to vote for the people for a change, and elect the qualified republican candidates.

#4 was a 6-line, 15-second spot broadcast April 19, 1972, in which the listener was invited to vote for Sinchak for State Committeeman.

#5 was a 16-line, 60-second spot broadcast October 14, 1969, wherein the listener was invited to (1) elect Carr as District Justice of the Peace; and (2) give Judge D. R. Carr "your vote." A two line disclaimer covered this 60-second announcement.

#6 was a 14-line, 60-second spot broadcast, not dated, wherein the listener was invited to vote for Senator George McGovern in the Pennsylvania State primary. A two line disclaimer covered this 60-second spot.

#7 consisted of a 3-line, 15-second spot broadcast October 27, 1971, wherein the listener was invited to vote for Kritsky for Treasurer of Westmoreland County. The disclaimer required 3 lines.

#8 consisted of an 8-line, 30-second spot broadcast on one or more days in April 1972, wherein the listener is invited to vote for Muskie for President on April 25. A two line disclaimer accompanied this political announcement.

#9 consisted of two four-line spots broadcast October 15, 1969, wherein the listener is invited to (1) vote for Kosick as Recorder of Deeds; and (2) two words "Paid Political" followed each spot announcement.

#10 consisted of dual spot broadcast September 8, 1971, wherein (1) B. Ellis in a 3-line spot asks the listener to "Put me back in office;" and (2) Ron Allen asks the listener in an 11-line spot to "Join the swing to the Republican party . . . Vote Republican. . . . A political announcement paid for by the Republican party of Fayette County."

In one single 15-line, 60-second political spot announcement broadcast October 10, 1969, the listener was invited to elect (1) a mayor, (2) a member of the council, (3) a comptroller, (4) a school director, (5) a justice of the peace, and (6) a city council.

55. At the evidentiary hearing held in Uniontown, Pennsylvania during the period October 9 through October 17, 1973, it was disclosed that one or more persons who were identified as being members of the Freedom Committee had sought positions of one type or another with station WCVI.

56. Some members of the Freedom Committee live in the Connellsville-Uniontown area. Some of the members of the Freedom Committee had been active in challenging the qualifications of the present ownership of station WCVI. Under the circumstances, the Presiding Judge has reason to believe that Broadcast Bureau Exhibit #57 lists each and every failure on the part of station WCVI to make the necessary sponsor identification announcement in connection with political announcements broadcast over station WCVI during the period October 10, 1969 through the political elections of 1972. During this

three-year time period the proper sponsor identification announcements were omitted on four (4) 60-second spots, two (2) 30-second spots, and two (2) 15-second spots. Stated in different terms—during the three year period, station WCVI failed to broadcast eight (8) political disclaimers. These eight omitted disclaimers totalled five minutes, thirty seconds of the broadcast time, an average of less than two minutes of omitted disclaimers per year.

57. The Presiding Judge is not aware that any candidate for political office or any other party either requested time to reply to a political broadcast or was refused an opportunity to reply to a political broadcast.

Issue 4—To determine whether the licensee failed to properly maintain or make available its public inspection file, in violation of Section 1.526 of the Commission's rules

58. The charge on which Issue 4 was based arose out of the fact that sometime on or shortly after January 1971, Mrs. Geshinsky, a member of the Freedom Committee, asked the station manager to see the station's license which was hanging on the wall. She also asked Mr. Calisti, an employee, what other material she was entitled to see. Other persons in the group were asking for "the fairness doctrine." She was advised that there was a survey which some in the group considered controversial. She learned that there were different things to be asked for. Following a few phone calls, five documents, grouped in Broadcast Bureau Exhibit #58, were provided. Mrs. Geshinsky and another lady took the documents, had them reproduced, then returned the originals. Mrs. Geshinsky does not recall whether Brian MacDonald did, or did not, suggest that she ask to see the license.

59. There is no evidence that FCC personnel have ever had any difficulty inspecting any and all pertinent material on those occasions during which they have inspected station WCVI. Mrs. Geshinsky had many friends on the staff of station WCVI who could have identified and obtained for her the pertinent documents kept in the offices of station WCVI in accordance with the requirements of Section 1.526 of the Commission's rules.

60. The contention, such as it is, that the licensee failed to properly maintain or make available its public inspection file in violation of Section 1.526 of the Commission's rules, is based on the slimmest of slim reeds. Issue 4 is resolved in favor of the applicant.

SUMMARY FINDINGS

61. There is no doubt but that Bernard Stern, an officer and stockholder of Connellsville Broadcasters, Inc., has used the facilities of three drug stores owned by him to engage in unlawful practices known to the Commission as "fraudulent billing" and "double billing." The manner in which the fraudulent billing practices were operated is summarized in paragraphs 18 through 25 of the findings of fact. The Presiding Judge has been unable to find where Bernard Stern has engaged in any constructive activity relating to station WCVI.

62. A careful and complete reading of paragraphs 26 through 55 of the findings of fact will establish that Dr. Cam T. Troilo has taken many steps in his efforts to respond accurately and fully to the con-

troversies surrounding the medical care offered by local hospitals. The contentions to the contrary are not supported by statements of any qualified practitioner. Medical care and treatment in the State of Pennsylvania is under the supervision and control of that state. There is no evidence that any official of the State of Pennsylvania, or any medical practitioner, has found fault with the manner in which the Connellsville State General Hospital has been and is operated. The controversy referred to in Issue 2 has nothing to do with the quality of the medical care offered by local hospitals but to whether station WCVI was required to make the facilities of station WCVI available to any and all persons who wished to go on the air to discuss medical care regardless of the ability of that person to contribute anything other than conversation. Dr. Cam T. Troilo did not violate the fairness doctrine. Issue 2 is resolved in favor of the applicant.

63. The facilities of station WCVI are located in the Laurel Highlands, an area considered by the Federal government to be a "depressed area." The young employees of station WCVI realize that the chance of obtaining funds with which to clean up and dress up Connellsville is not good. They realize that the wives of capable young doctors want to live in clean and attractive surroundings.

64. These same employees knew that the FCC was again charging station WCVI with fraudulent billing practices. They knew also the identity of those who have engaged in such practices. It was at or about this time that a young lady who had served the station for some twelve years was dismissed because she carried out the instructions of her immediate superiors. A well known male employee believed he was set aside for one week without justification.

65. The tragic situation was the fact that the young employees began to lose hope and became frustrated. It was under such situations that some employees of station WCVI and others gathered together under the name "Freedom Committee."

66. The Presiding Judge finds that, except for the tragic situations summarized above, there would have been no Issue 2, 3, or 4. The Presiding Judge finds that Mrs. Loraine Livingston was dismissed without just cause.

CONCLUSIONS

1. The Presiding Judge, acting under authority of the Commission's Memorandum Opinion and Order and Notice of Apparent Liability, 40 FCC 2d 678, released April 17, 1973, finds that the hearing record does not warrant an order denying the application of the renewal of license of station WCVI, Connellsville, Pennsylvania, but finds that the hearing record warrants that Bernard Stern, an officer and stockholder of the applicant corporation, be assessed a forfeiture in the amount of five thousand dollars ($5,000) and that the license be granted for a period not to exceed one year.

IT IS ORDERED that unless an appeal to the Commission is taken by any party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the rules:

(1) Bernard Stern, an officer and stockholder of the applicant corporation, be assessed a forfeiture in the amount of five thousand dollars ($5,000);

(2) That the license of Connellsville Broadcasters, Inc., BE GRANTED for a period not to exceed one year from the release of this Initial Decision;

(3) That for a period of one year from the release of this Initial Decision the licensee shall not broadcast over the facilities of station WCVI any order or message from Bernard Stern or from any of the three Burns Drug Stores owned by the said Bernard Stern.

(4) That for a period of one year from the release of this Initial Decision, Bernard Stern shall on the third Monday of each month mail to the Commission a letter stating his then current phone number and the address at which he can be reached by mail.

BASIL P. COOPER,
Administrative Law Judge,
Federal Communications Commission.

FCC 74-432

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Petition of CONTINENTAL CABLEVISION OF NEW HAMPSHIRE, INC., MANCHESTER, N.H. For Special Relief	Docket No. 20029

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released May 3, 1974)

BY THE COMMISSION:

1. On December 19, 1973, Continental Cablevision of New Hampshire, Inc., filed a "Petition for Immediate and Ex Parte Relief" alleging unlawful and unreasonable collusive conduct on the part of United Broadcasting Company, Inc., United Cable Company of New Hampshire, Inc., and New England Telephone and Telegraph Company. Continental requested that a hearing be designated to investigate the conduct of United Cable and N.E. Telco—particularly whether N.E. Telco's treatment of multiple applicants for CATV pole attachments is consistent with announced Bell System policy and this Commission's rulings. Continental's petition was treated as an informal complaint pursuant to the provisions of Section 208 of the Communications Act of 1934, as amended. By a "Notice of Complaint" dated December 20, 1973, the Chief, Domestic Rates Division, Common Carrier Bureau, advised N.E. Telco that further construction would be at its own risk, and directed it either to satisfy the complaint or to advise the Commission of its inability or refusal to do so not later than January 2, 1974. On December 31, 1973, N.E. Telco filed an answer, and United Cable filed comments on January 10, 1974. Continental filed comments regarding N.E. Telco's answer on January 17, 1974. On March 13, 1974, the Commission adopted a "Letter to Thomas W. Scandlyn et al." FCC 74-259, —— FCC 2d ——, in which it found that "the conduct of United Cable and N.E. Telco [summarized in paragraph 2 below] appears to be unduly discriminatory and anti-competitive in nature" and cautioned that "unless the aforementioned conduct is immediately terminated, appropriate action will be taken." Thereafter, additional letter comments were filed by the interested parties as follows: American Telephone and Telegraph Company on March 22; New England Telco on March 22; United Cable on March 25; and Continental Cablevision on March 28.

2. The operative facts are set forth fully in our cited letter. For present purposes, they may be synopsized as follows: both Continental and United Cable are franchised to serve portions of Manchester; however, N.E. Telco will not act on Continental's

pole attachment request until it executes a pole attachment agreement, and one condition of the pole attachment agreement is Continental's acceptance of N.E. Telco's recently adopted "first-come, first-served" policy regarding "make ready" costs. Under the "first-come, first-served" principle, the first operator on a pole bears the "make ready" costs for its single attachment, and the second operator bears the "make ready" costs for the second attachment; the result is that the second applicant must pay higher costs than the first applicant. In the meantime, United Cable, allegedly pursuant to appropriate contractual provisions, is proceeding to attach wire and hardware in the portions of the city in which Continental and United Cable are franchised to compete. In the present case, the ability of United Cable to attach wire and hardware to poles not needing "make ready" work, together with the additional cost to be incurred by Continental for its "make ready" work, could have significant impact on the competitive situation between Continental and United Cable in Manchester and it appears that Continental would suffer discrimination if the "first-come, first-served" doctrine is applied.[1]

3. As indicated, we have already found substantial indication that the conduct of United Cable and N.E. Telco is discriminatory and anti-competitive in nature. The telephone companies and United urge that the Commission has not asserted jurisdiction over pole attachment agreements.[2] However, we do have jurisdiction over cable systems and authorize their carriage of distant television signals, and we have a substantial concern that they operate on a reasonable competitive basis. The situation presented here clearly warrants a hearing to determine whether United is doing so. In the meantime, as pointed out above, further implementation of the existing contract will go far to make impossible any remedial action which the hearing may show to be necessary. We do not believe that we can permit the *status quo* to be changed pending the hearing, and will therefore require that it be maintained *pendente lite*. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968).[3] Since this procedure is unusual, however, we will *sua sponte* expeditiously consider lifting this stay before conclusion of this proceeding. Accordingly, all parties are directed to file comments (including any supporting evidence) whether this stay should be lifted, modified or kept in effect within thirty days of the release date of this Memorandum Opinion and Order.

4. Accordingly, in view of the above, IT IS ORDERED, That this proceeding IS DESIGNATED for hearing, at a time and place to be specified in a further Order, upon the following issues:

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[1] In this regard, we also note indications that United held its pole attachment contract for some time without taking significant action to assure early construction. This delay necessarily casts an additional pall on the priority asserted for United's contract.

[2] For example, although AT&T cites the Commission's Public Notice of August 3, 1973, regarding Docket No. 16928 (FCC 73-851, 42 FCC 2d 460) wherein the Commission announced that it had "instructed the staff to draft appropriate documents asserting jurisdiction over pole attachments," it seeks to rebut it by arguing that no such documents have been issued.

[3] See also Section 76.7 of the Rules, which provides in pertinent part that: "(a) On petition by a cable television system, a franchising authority, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to cable television systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question."

1. To determine the facts and circumstances surrounding the offering by New England Telephone and Telegraph Company of pole attachment contracts for Manchester, New Hampshire, to (a) United Cable Company of New Hampshire, Inc., and (b) Continental Cablevision of New Hampshire, Inc.

2. To determine in light of the evidence adduced pursuant to Issue 1, above, whether the conduct of United Cable Company of New Hampshire, Inc., and New England Telephone and Telegraph Company, Inc., has been unduly discriminatory and anti-competitive in nature with respect to Continental Cablevision of New Hampshire, Inc.'s efforts to obtain a pole attachment agreement to operate at Manchester, New Hampshire.

3. To determine, in light of the conclusion reached regarding Issue 2 above, what further action is required in order to serve the public interest.

IT IS FURTHER ORDERED, That American Telephone and Telegraph Company; New England Telephone and Telegraph Company; Continental Cablevision of New Hampshire, Inc.; United Cable Company of New Hampshire, Inc.; Chief, Cable Television Bureau; and Chief, Common Carrier Bureau ARE MADE parties to this proceeding.

IT IS FURTHER ORDERED, That United Cable Company of New Hampshire, Inc., has the burden of proceeding with respect to Issue 1(a); that Continental Cablevision of New Hampshire, Inc., has the burden of proceeding with Issue 1(b), and that Continental Cablevision of New Hampshire, Inc., has the burden of proof with respect to Issues 2 and 3.

IT IS FURTHER ORDERED, That, pending the outcome of this proceeding, United Cable Company of New Hampshire, Inc., IS DIRECTED to cease additional construction of its cable television system on New England Telephone and Telegraph Company's telephone poles where access has been obtained by means of the pole attachment contract here in issue in those areas for which Continental Cablevision of New Hampshire, Inc., has also sought a pole attachment contract.

IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the parties herein, pursuant to Section 1.221(e) of the Commission's Rules, in person or by attorney, shall, within 20 days of the mailing of this Order, file with the Commission in triplicate a written appearance stating their intention to appear on the date set for the hearing and present evidence on the issues specified in this Order.

IT IS FURTHER ORDERED, That the ruling as to temporary relief shall be effective on the third day, not counting Saturdays, Sundays, and holidays, after the day of release of this Opinion, provided that the ruling on temporary relief shall not be effective until judicial determination of the motion for stay in the case of any respondent which notifies the Commission within 2 days that it intends to seek judicial review and which seeks judicial review and a judicial stay within 14 days of the day of release of this Opinion.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-400

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Public Notice
CONCERNING NEW PROCEDURES ON PETITIONS
TO DENY APPLICATIONS IN THE DOMESTIC
PUBLIC LAND MOBILE RADIO SERVICE

APRIL 17, 1974.

NEW PROCEDURES ON PETITIONS TO DENY APPLICATIONS IN THE DOMESTIC PUBLIC LAND MOBILE RADIO SERVICE

Because of the proliferation of petitions to deny applications in the Domestic Public Land Mobile Radio Service, we are adopting new procedures to insure that the public receives needed radio common carrier service and that qualified carriers are given an opportunity to render such service.

In nearly every disputed case, petitioners are existing licensees who have objected to the entry of an applicant who proposes similar service in the same market. To support their petitions, these licensees have alleged that the market conditions are such that their own operations cannot survive added competition, and that the applicant has failed to demonstrate the need for an additional licensee to offer similar communications service.

As of May 1, 1974, the pending renewal applications of all existing licensees who presently have petitions to deny on file, which include the aforementioned arguments, and who have requested that the Commission designate the respective applications for a hearing pursuant to Section 309(e) of the Communications Act of 1934, as amended, will be designated for hearing with the applicants. The hearing will determine first, whether the particular market will support an additional carrier. If this is found to be the case, and assuming that all else is in order, then both the new application and the existing licensee's renewal application can be granted. If instead, it is found that the market cannot support an additional carrier, the hearing will proceed on a comparative basis to establish whether grant of the new application or grant of the existing licensee's renewal application would best serve the public interest. With respect to this latter question, the petitioner will be given no preference based solely on his status as an existing licensee.

If a petitioner does not wish to maintain his protest, notice of withdrawal should be filed with the Commission before May 1, 1974. Requests for extensions of time to consider withdrawal will be looked upon with disfavor.

The Commission concluded in the guardband decisions that competition between radio common carriers and wireline carriers is beneficial to the public, see Commission *Report and Order* in Docket No. 16778, 12 FCC 2d 841 (1968), *Aff'd sub nom. Radio Relay Corporation* v. *FCC* 409 F. 2d 322 (2d Cir. 1969). We find that competition between and among radio common carriers will also benefit the public with respect to the diversity of service offered, quality of the service, and rates charged for mobile communications. Radio common carrier service is not limited in its scope, but provides such varied communications forms as paging, two-way, interconnected, noninterconnected and message relay service. These services, although included within our licensing function, are basically unregulated by this Commission. If competition is fostered in a given market, it is our belief that competing licensees will be prompted to meet any requirements for service to which the public is entitled.

Action by the Commission April 16, 1974. Commissioners Wiley (Chairman), Lee, Reid, and Hooks.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
ALFRED M. LILIENTHAL
Concerning the Fairness Doctrine involving Station WMCA, New York, N.Y.

APRIL 30, 1974.

DR. ALFRED M. LILIENTHAL,
Middle East Perspective,
850 Seventh Avenue,
Suite 1102,
New York, N.Y. 10019

DEAR DR. LILIENTHAL: This is in reference to your letter of April 3, 1974, wherein you claim that Radio Station WMCA, New York, New York has failed to adhere to the obligations imposed upon it by the fairness doctrine. You assert that you are entitled ". . . to a reasonable amount of time to present a viewpoint in contrast to the opinions aired [March 11, 1974 over WMCA] by the Anti-Defamation League [of B'nai B'rith on the meaning of anti-Semitism]." You further assert that "[t]here is nothing more important to the American public than a discussion of what is and what is not anti-Semitism, particularly as this matter relates to the formulation of American foreign policy in the Middle East." Additionally, in your March 28, 1974 letter to the station—a copy of which you included as part of your complaint to the Commission—you asserted that you rejected the station's offer of time to appear to present your views, since the station also planned to have two spokesmen of the Anti-Defamation League on the same program to present their points of view. You stated that such a program format was unacceptable to you since you felt that the station's programming decision to require you to appear with a spokesman for a point of view opposite to yours ". . . was in violation of the meaning of the Fairness Doctrine. . ." You further asserted that you ". . . had no intention of appearing with people whose credentials could not match mine."

Under the fairness doctrine, if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. This policy does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to as-

sure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith. For your further information, we are enclosing a copy of the Commission's Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance."

In regard to your claim that WMCA may have failed to meet its fairness doctrine obligations, where complaint is made to the Commission under the fairness doctrine, the Commission expects a complainant to submit specific information indicating, *inter alia*, reasonable grounds for the allegation that the station involved has presented one side of a controversial issue of public importance, and has not afforded, nor plans to afford, a reasonable opportunity for the presentation of contrasting views on that issue in its overall programming. As one court has observed.

> On a complaint under the fairness doctrine, the burden is not only on the complainant to define the issue, but also to allege and point specifically to an unfairness and imbalance in the programming of the licensee devoted to this particular issue. *It is not enough for the complainant to allege there is a controversial issue of public importance on which the complainant wants to be heard* . . . . The essential element in invoking the fairness doctrine is that the licensee has not hitherto provided fair and balanced programming on this particular issue, and therefore, and only therefore, can the complainant assert a right for someone to be heard to rectify the existing imbalance. [Emphasis added.] *Healey* v. *FCC*, 460 F. 2d 917, 921 (D.C. Cir. 1972).

You have made no showing that WMCA has failed to meet its fairness doctrine obligation. You have failed to provide sufficient information to show that the question of "what is and what is not anti-Semitism" is or was a controversial issue of public importance, either nationally or in WMCA's local area at the time of the March 11, 1974 broadcast. Furthermore, assuming *arguendo*, that this issue was a controversial issue of public importance, you make no showing that the licensee failed to present contrasting views on this "issue" in its overall programming. Indeed, your letter to Mr. Clifford Barrett, Program Director of WMCA—a copy of which you enclosed with your letter of complaint to the Commission—indicates that the licensee in fact offered you the opportunity to appear on the station to discuss this "issue", and that you refused to accept this offer.

In light of the foregoing, no further Commission action on your complaint appears warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division,
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
ACCURACY IN MEDIA, INC.
Concerning the Fairness Doctrine involving NBC

APRIL 30, 1974.

ACCURACY IN MEDIA, INC.,
1232 Pennsylvania Building,
425 13th Street NW.,
Washington, D.C. 20004

GENTLEMEN: This is in reference to your fairness doctrine complaint against the National Broadcasting Company (NBC) and "its affiliated stations" concerning its broadcast of two documentaries on Mainland China. The first of these documentaries, entitled "China Lost and Found," was broadcast on February 15, 1972; and the second, entitled "The Forbidden City," was broadcast on January 16, 1973.

Your letter to the Commission, dated April 16, 1973, stated that the principal theme of "China Lost and Found" was ". . . the highly controversial line that the United States had made a bad error in supporting the Nationalist Government of China during and immediately following World War II." You further argued that NBC failed to present a balanced presentation on a ". . . subsidiary controversial line that was given much attention in this program . . .[:] that four foreign service officers . . . had tried to get the U.S. Government to see the error of backing Nationalist China rather than the Communists and had been punished for this even though their advice was clearly correct." You further stated that "[t]he question of the rightness or wrongness of American policy in China has been one of the major controversies in the foreign policy field for the past two decades . . .." and that "[t]he controversy still rages today." In support of this conclusion you asserted that the American Foreign Service Association had held an official luncheon to show its support for the "version of history" of the four foreign service officers referred to above, while the Council Against Communist Aggression had sponsored a dinner to honor certain experts on China who "feel very strongly that the true facts are very different from the version presented by NBC and its one-sided panel of experts."

You state in your letter that you brought the foregoing comments to the attention of NBC in a letter to it, dated February 12, 1973, a copy of which you attached to your letter of complaint to the Commission. In its reply letter of March 1, 1973, NBC informed you of its judgment that none of the items to which you had referred constituted a controversial issue of public importance. Rather, NBC stated, ". . . they are

all historical in nature; the matters referred to took place many years ago. Accordingly, we see no useful purpose to be served in a discussion of the detail of those items."

In response to NBC's conclusion that the matters to which you referred did not constitute *current* controversial issues of public importance, you asserted, in your letter to the Commission, that "[i]t seems absurd that we should have to explain to NBC or anyone else the importance of history and of understanding what has transpired in the past, especially the recent past. . . . Conceptions of what has gone on in the past are powerful influences upon what men think about the problems that confront them currently." You further asserted that "[t]he view of the modern history of China presented by NBC in the program, 'China Lost and Found,' closely approximates the version of history favored by Communist China . . . ," and you expressed your hope that the Commission ". . . will not be impressed by the NBC argument that events that happened 25 years ago are of no importance and that the networks are free to distort history and misrepresent the past in any way that pleases them."

With respect to the second documentary to which you referred, "The Forbidden City," you asserted that, although much of the program concerned the history and artistic beauty of that portion of Peking known as the Forbidden City and that this aspect of the program was not a matter of controversy, the latter part of this documentary was, in your opinion, ". . . largely Chinese Communist propaganda." You stated that the documentary ". . . 'informs' the American audience about education available to the children of factory workers . . . ," but that NBC has failed to mention that ". . . from late 1966 until late 1968 there was no schooling at all, since the schools were closed down because of the Great Cultural Revolution." Moreover, you asserted that NBC has failed to inform its viewers about the type of education presently offered in Mainland China's schools. You cited several statements excerpted from the *New York Times* which suggest that there is a great deal of Maoist influence in such education and stated that these statements paint ". . . quite a different picture from the idyllic scene of 'free' schooling offered in the NBC documentary."

You stated that in "The Forbidden City" NBC made no mention of the ". . . flight of many thousands of young people from Communist China . . . ," and that NBC ". . . made no effort to confirm or check the information that it obtained inside the Communist China by checking with any of the refugees who had been successful in escaping in recent years." You argued that "[c]onditions in Communist China are a controversial issue of public importance . . . ," and that "[i]t is shocking that NBC, with so many people who have escaped and are free to tell the truth about living conditions in Communist China, should feed its audience only statements made by individuals who are totally under the control of the regime and who would not dare say anything that conflicted with the official propaganda line." Apparently quoting from a transcript of the "Forbidden City" documentary, you stated that "[i]t is clearly highly debatable that 'the world has *always* been a warm and beautiful place' for the young Chinese under the Communist regime . . . ," and that "[t]here can be no question but that this theme in the NBC program is highly controversial."

In its March 1, 1973 reply to your letter, NBC stated that its judgment was that the state of well-being of the Chinese people does not constitute a controversial issue of public importance. Moreover, NBC disagreed with your conclusion that "The Forbidden City" contained a message that "everyone in China today is well-fed, well-housed, and well-clothed, and that those who have grown up under a Communist regime have never known hunger." Rather, NBC asserted:

> The program was a report of what the NBC News team observed in the area of China which they visited. This is made abundantly clear in the last statement on the program: "We spent one day in the Forbidden City with the Liu family—one Sunday and five centuries. What you have seen and heard is precisely what we saw and heard." Your references to descriptions by two refugees . . . do not seem relevant to this observation.

NBC concluded by advising you that it did not consider any of the matters cited in your letter to involve the presentation of one side of a controversial issue of public importance, and that it planned no further action on your complaint.

You disputed NBC's conclusion that the state of well-being of the Chinese people does not constitute a controversial issue of public importance. Moreover, you took issue with NBC's judgment that the "Forbidden City" documentary contained no "message" that conditions in China were good. You further asserted that "[i]t seems quite likely that the inclusion of the propaganda message was the price that NBC had to pay to film the Forbidden City." You further asserted that ". . . NBC does not contend that it has presented any programs in the past year which would give the other side of these controversial issues . . .," and you submit that the Commission find that NBC has violated the fairness doctrine in its presentation of the two documentaries discussed above.

As has been frequently observed, "[t]o invoke the fairness doctrine . . . there must exist a controversial issue of public importance on which the licensee has refused to allow a reasonably balanced point of view." *Green* v. *FCC*, 447 F. 2d 323, 327 (D.C. Cir. 1971), quoted with approval in *Healey* v. *FCC*, 460 F. 2d 917 (D.C. Cir. 1972). The Commission has long held, in this regard, that it is both the responsibility and within the discretion of the broadcast licensee or network to determine whether a controversial issue of public importance has been presented in its programming, and that the burden is on the complainant to establish that the licensee's or network's judgment in such matters was unreasonable or in bad faith. See *In re Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 FCC 598 (1964); *Report on Editorializing*, 13 FCC 1246 (1949). As the Commission has stated:

> The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. 13 FCC at 1251.

104-038—74——6

Generally, the Commission will review a licensee's or network's decisions pursuant to the fairness doctrine only to determine whether the licensee can be said to have acted reasonably and in good faith under all the facts and circumstances presented.

With these principles in mind, the specific issues on the facts presented are: (1) the reasonableness of NBC's judgment that the matters to which you referred in "China Lost and Found" did not constitute current controversial issues of public importance; and (2) the reasonableness of NBC's judgment that the state of well-being of the Chinese people does not constitute a controversial issue of public importance.

As to the first of these two issues, it must be noted that all of your contentions concerning "China Lost and Found" relate to historical events. While such matters may have been at one time controversial and of public importance, it does not appear that NBC was unreasonable in concluding that they are not *currently* the subject of any controversy of public importance. See *Accuracy in Media Inc.*, 42 FCC 2d 426 (1973); *Gary Lane, Esq.*, 38 FCC 2d 45 (1972); *Kilsoo Haan*, 37 FCC 2d 947 (1972). As the Court of Appeals has observed:

> Merely because a story is newsworthy does not mean that it contains a controversial issue of public importance. Our daily papers and television broadcasts alike are filled with news items which good journalistic judgment would classify as newsworthy, but which the same editors would not characterize as containing important controversial public issues. *Healey* v. *FCC*, 460 F. 2d 917, 922 (D.C. Cir. 1972).

With respect to "The Forbidden City," NBC disagrees with your conclusion that the program contained a "message" that "everyone in China today is well-fed, well-housed, and well-clothed, and those who have grown up under a Communist regime have never known hunger." You have failed to show that NBC's judgment on this point was unreasonable. It appears that NBC qualified its presentation of "The Forbidden City" by stating that the program dealt with only one day in the life of one Chinese family. It would be inappropriate for the Commission, as the governmental licensing agency, to determine whether NBC should have added other statements to the script of "The Forbidden City" documentary, or whether NBC should have interviewed additional individuals on the program. It is not the Commission's function to determine the content of any documentary programs.

To the extent that some of the allegations made in your letter of complaint to the Commission challenge the truth or accuracy of the material broadcast in the two documentaries under consideration, one further point merits attention. Commission policy regarding complaints disputing the truth or accuracy of purportedly factual presentations has been that, absent extrinsic evidence of deliberate distortion or of staging, the Commission cannot undertake review of such allegations. As the Commission has stated:

> * * * the critical factor making Commission inquiry or investigation appropriate is the existence or material indication, in the form of extrinsic evidence, that a licensee has staged news events. Otherwise, the matter would again come down to a judgment as to what should have been presented—a judgmental area for broadcast journalism which this Commission must eschew.

For the Commission to investigate mere allegations, in the absence of a material indication of extrinsic evidence of staging or distortion, would clearly constitute a venture into a quagmire inappropriate for this Government agency. *Letter to ABC, et. al.*, 16 FCC 2d 650, 657–8 (1969). See also *Letter to Mrs. J. R. Paul*, 26 FCC 2d 591 (1969).

In view of the foregoing, no further action is warranted on your complaint. The delay in responding to your complaint, because of the heavy workload of the Commission, is regretted.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division,
for Chief, Broadcast Bureau.

FCC 74D-17

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of FLORIDA AIRMOTIVE OF BOCA RATON, INC., BOCA RATON, FLA.	Docket No. 19765 File No. 88-A-RL-122
TOMLEE CORP., DOING BUSINESS AS BOCA FLITE CENTER, BOCA RATON, FLA. For Aeronautical Advisory Station to serve the Boca Raton Airport, Boca Raton, Fla.	Docket No. 19766 File No. 42-A-L-33

APPEARANCES

M. Lee Thompson (Thompson, Tucker & Slawson) on behalf of Florida Airmotive of Boca Raton, Inc.; *Lee N. Robinson*[1] *pro se* on behalf of Tomlee Corporation, d/b as Boca Flite Center, and *Terence P. O'Brien* on behalf of Acting Chief, Safety and Special Radio Services Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE BYRON E. HARRISON

(Issued February 27, 1974; Effective April 25, 1974 pursuant to Section 1.276 of the Commission's Rules)

PRELIMINARY STATEMENT

1. The applications of Florida Airmotive of Boca Raton, Inc. (Florida Airmotive) and Tomlee Corporation, d/b as Boca Flite Center[2] (Tomlee) both request authority from the Commission to operate an aeronautical advisory station (more popularly known as a Unicom Station) at Boca Raton Airport, Boca Raton, Florida.

2. Under Rule 87.251(a), "Only one aeronautical advisory station may be authorized to operate at a landing area: . . ."[3] In light of this rule provision, the Commission's Safety and Special Radio Services Bureau (Bureau), by delegated authority, treated the two applications as mutually exclusive, and, by Order released June 12, 1973 (Mimeo No. 03484), consolidated them in the present proceeding and designated them for hearing pursuant to the provisions of Section 309(e) of the Communications Act of 1934, as amended, on the following issues:

a. to determine which applicant would provide the public with better aeronautical advisory service based on the following considerations:

[1] Mr. Robinson is the President of Tomlee Corporation and appears pursuant to Section 1.21(d) of the Rules.

[2] The Tomlee Corporation sometimes appears on documents as the TOM-LEE Corporation and it sometimes does business under the trade name Boca Flight Center.

[3] The sole exception to this rule is not applicable in this case.

(1) location of the fixed-based operation and proposed radio station in relation to the landing area and traffic patterns;
(2) hours of operation;
(3) personnel available to provide advisory service;
(4) experience of applicant and employees in aviation and aviation communications;
(5) ability to provide information pertaining to primary and secondary communications as specified in Section 87.257 of the Commission's rules;
(6) proposed radio system including control and dispatch points; and
(7) the availability of the radio facilities to other fixed-base operators.

b. to determine whether Florida Airmotive of Boca Raton, Inc. has operated an aeronautical advisory station at Boca Raton Airport in violation of the Commission's rules and, if so, the effect of such violations on Florida Airmotive's qualifications to be a Commission licensee; and,

c. to determine in light of the evidence adduced on the foregoing issues which, if either, of the applications should be granted.

3. A prehearing conference and hearing were held at Boca Raton, Florida on August 9, 1973. The record was closed on the same date and both applicants were directed to file proposed findings of fact and conclusions of law on September 24, 1973. Optional reply findings could be filed on or before October 1, 1973. Both Florida Airmotive and the Bureau filed timely proposed findings. Tomlee did not file proposed findings, timely or otherwise, but did file a document on October 3, 1973 titled "Applicant's Statement and Exceptions To Proposed Findings of Fact and Conclusions". Tomlee has submitted no pleading concerning its failure to file, timely or otherwise, proposed findings as ordered. Accordingly, pursuant to Section 1.263(c), Tomlee is deemed to have waived its right to participate further in this proceeding and its late-filed pleading in the nature of reply findings and statement is rejected. The necessity for this ruling is dictated not only by the failure to file proposed findings as ordered, but to avoid basic unfairness to the other parties.[4] The rejected pleading contains inferences which are not supported by the record.

FINDINGS OF FACT

4. Boca Raton Airport is not presently served by an FAA Airdrome Control Station or a Flight Service Station located at the landing area. Section 87.253(a)(1) requires aeronautical advisory stations at landing areas without such FAA facilities to operate on the frequency 122.8 MHz. Accordingly, when private aircraft approach, the only air-ground communication such aircraft have available is by use of the so-called Unicom station.

5. Under the rules (Section 87.257(d)(1)), the Unicom station is allowed, under these conditions, to provide a complete advisory service which could include information pertaining to conditions of runways, wind conditions and weather information. Unicom stations may also provide *on an impartial basis*, information concerning available ground services. Also on a secondary basis the Unicom station may

[4] The rejected pleading reviews some corporate difficulties which Tomlee asserts resulted in its failure to place matters in the record which should have been pursued at the hearing concerning alleged violations of Florida Airmotive. Consideration of what could have been shown is no substitute for presentation of evidence at the hearing which would be subject to cross-examination. It also seeks to avoid the onus of Tomlee's use of unauthorized transmitters as the person who gave such testimony is no longer with the corporation. The pleading also deals with matters which would involve rule making.

provide information necessary to in-flight stopover on ground transportation, food and lodging. For example, Joint Exhibit No. 2 shows that information is available at Boca Raton Airport on "Ground trans.—Car rentals, limousine: Lodging—Inn (2 miles); Resorts—Florida beaches." The Boca Raton Airport has two aircraft service organizations located on the field which are the two applicants in this proceeding.

Location of the Fixed Base Operation and Proposed Radio Station in Relation to the Landing Area and Traffic Patterns

6. The only runway at the airport is identified as No. 4 in a northeasterly direction and No. 22 in a southwesterly direction. Both Florida Airmotive and Tomlee are located more proximate to the end of the runway identified as No. 22. Florida Airmotive is the licensee of the present Unicom facility and its facilities are located in a building positioned at a right angle to runway No. 22. That part of the building closest to the runway is used for the Unicom operation. From here the Florida Airmotive Unicom station operator has an angle of visibility in excess of 270° through a picture window. This permits the entire runway to be viewed for vehicles or aircraft. However, part of the cement apron is obscured by a two to three foot stand of saw grass.[5]

7. The Tomlee Unicom operator would be located a little west of the Florida Airmotive building. The Tomlee Unicom operator could view air traffic in the approach pattern to runway No. 4, but, would not be able to see the aircraft on its final approach unless the operator goes right up to the window and looks out at a right angle. If an aircraft departs on runway No. 22, the saw grass would cause obstruction. In the case of jet aircraft, which have longer runway takeoff requirements, the saw grass would partially obscure the last 1,500 feet of runway. The runway is paved for 5,150 feet of which 3,950 feet is lighted. One hazzard is noted for the field which is an aerial sign pick-up device. The prevailing winds in Florida vary with the season. Normally they are out of the southeast and the east except in July or, August and September when the winds move around to southwest. But the wind can switch anytime during a thunderstorm condition. However, in general, the prevailing runway is No. 4.

Hours of Operation

8. Florida Airmotive's regular hours are from 0800 to 2100 hours but quite often it operates from 0700 to 2300 hours. Tomlee operates on a regular basis from 0800 to 1900 hours. However, on occasion Tomlee opens earlier depending on when their people arrive and sometimes they stay open until 2000 hours.

Personnel Available to Provide Advisory Service

9. Florida Airmotive has twelve full-time and one part-time employees. Of these, nine have a license to operate the radio. The primary duties and responsibilities for the Unicom station are assigned to Kerstin Ludington, a licensed pilot and FCC permit holder. She operates the Unicom station from 8:30 or 9:00 o'clock in the morning to 1:00 p.m. Mr. Murphy, the assistant manager, operates the station

[5] The saw grass is on Atlantic University property.

prior to Mrs. Ludington's arrival. Mr. Safris is the operator on duty from 1:00 p.m. to 9:00 p.m.

10. Tomlee's operator on duty would be Miss Hawkes who works in the office and has an FCC radiotelephone permit. In addition, there are six other employees who have radiotelephone permits. However, Mr. Robinson, the President or Mr. Coveney would be primarily responsible during Miss Hawkes' absence.

Experience of Applicant

11. Until about one and one-half years ago, Florida Airmotive was the only service facility at the airport and it has operated the Unicom station at the airport for about 11 years. Mr. Gassaway, the President, has been in aircraft servicing since 1945 and with Florida Airmotive since its inception in May, 1961. Personnel available to operate the Unicom station are mentioned in paragraph 9 above. In addition, Florida Airmotive has employees familiar with ground handling of aircraft, mechanics, so-called on-the-line work and fueling as well as qualified pilots and flight instructors. During the approximate 11 years Florida Airmotive has had two violation notices from the FCC. One of the notices was received in 1972 and concerned off-frequency operation. This was resolved by replacing the Unicom set and advising the Commission by letter. Florida Airmotive has heard nothing since then on the matter.

12. Tomlee's President, Mr. Robinson, has an academic (math and physics) and working background in electronics and radio communications. Included in his experience are such matters as transistor experimentation, analog computing, scanning and instrumentation work. He has held a radio amateur-Advanced Class-Operator license for 27 years and has built and operated radio transmission equipment up to and including 1,000 watts. He is a pilot and has had experience in communicating and operating air-ground and air to air equipment as well as communications with Florida Airmotive's Unicom station. Tomlee, as a corporation, was established about 2 years ago and it has operated an aircraft service facility at the airport for the past one and one-half years. Other Tomlee personnel who would be available to operate the Unicom station are mentioned in paragraph 10 above. In addition, Tomlee has personnel who are licensed pilots, flight instructors and familiar with aircraft servicing and aircraft communication with Florida Airmotive's Unicom station and other types of aircraft radio communication considered *infra*. Tomlee does operate radio transmitters that communicate with aircraft that are licensed in other services. Such matters as were developed in the record are considered under the general issue of experience of the applicant and employees in aviation and aviation communication.

13. Tomlee now has two transmitters at its airport facility. One is a so-called corporate enrout facility which is primarily for operational communication to large common carriers. The facility is primarily licensed to Radio Aeronautical, Inc. and operates on the frequency 129.1 MHz. Tomlee is a contractor to Radio Aeronautical, Inc. and has a sub-license from them as their agent. A so-called fleet license is available for aircraft communicating with this facility which license Tomlee initially did not have. In fact, it was not sure just how to

obtain a fleet license until a visiting pilot explained the necessary FCC procedure to its satisfaction. In the meantime, Tomlee was receiving Commission violation notices for unlicensed operation of transmitters aboard aircraft. During this period, Tomlee did apply for a fleet license but continued operating the unlicensed transmitters on the assumption that it would soon receive the fleet license. Then around February 12, 1973 a Commission representative, Mr. Haver Thompson,[6] telephoned Mr. Robinson, the President of Tomlee and advised him that you must have a license to operate the transmitters. Mr. Thompson explained that Mr. Robinson or Tomlee could apply for a Special Temporary Authority (STA) to cover use of the transmitters and regularize their operation until the fleet license was received. Mr. Robinson and Tomlee understood that either an STA or regular license was needed to operate a transmitter. However, Tomlee continued to believe the fleet license would soon arrive and did nothing further. Tomlee continued to operate the unlicensed transmitters and it did not seek the STA and in Mr. Robinson's words, "time goes breezing along, you are operating, you are doing things and have many other things on your mind and time went by so rapidly the next thing I knew it was four or five months later before I was actually able to get what I needed", i.e., the fleet license. Tomlee's second transmitter operates on 123.3 MHz which is an aviation instructional frequency.

14. Tomlee also admits placing a crystal tuned to the Unicom frequency (122.8 MHz) in one of its two transmitters and making occasional unauthorized (unlicensed) transmissions on the Unicom frequency. In one instance the use of the Unicom frequency by Tomlee was believed necessary to avoid a serious accident. Other uses of this Unicom frequency involved times when it believed there was no traffic on the Unicom. Tomlee recognizes that it had no authorization to change one of its transmitters to the Unicom frequency and transmit with such modified transmitter and that "you should be duly licensed."

Ability To Provide Information

15. Both applicants would rely on the same lighted wind sock to provide wind direction and wind speed. There is a wind speed indicator on the field, but, it is not operating properly. Also, both applicants would be able to provide the same type of information since each, in addition to use of the same wind sock offer generally the same type of service to aircraft except for fuel which is now provided only by Florida Airmotive. Tomlee did have fuel up to several weeks before the hearing, and expects to resume fuel service in the near future.

Proposed Radio System

16. Florida Airmotive now operates with a NARCO transmitter and it would propose to continue such use. Both the transmitter and control point are located in it offices. There have been no dispatch points for this facility, and none are proposed in the future.

17. If Tomlee is the successful applicant, it would locate the Unicom transmitter and control point in it offices. The antenna would be added to their present crank up antenna tower on which they currently have

[6] Mr. Robinson recalls the telephone conversation, but did not seem sure of just exactly who had called him.

mounted transmitting antennas for 123.3 and 129.1 MHz. Tomlee would permit other aircraft service facilities on the field to have a dispatch point.

Violation of Florida Airmotive

18. The hearing issue is quite broad, i.e., to determine if Florida Airmotive has operated the Unicom in violation of the Commission's Rules. The issue is not qualified as to any particular area of interest. However, all parties have proceeded on the basis that this is an anti-competitive practices issue.

19. Tomlee attempted to demonstrate that aircraft in its service area were diverted, by means of the Florida Airmotive Unicom facilities, to the service area of Florida Airmotive. Further, Tomlee alleges that Florida Airmotive has used its Unicom station to make disparaging remarks about Tomlee's service facilities, and that Florida Airmotive was not as prompt as it could have been in answering calls from approaching aircraft when it was obvious they would use Tomlee service instead of Florida Airmotive service.

20. No findings can be made on this record on any of the alleged anti-competitive practices. Testimony concerning the disparaging remarks was stricken upon motion by the Bureau when it developed that Tomlee's belief involved speculation and guesses as to what may have taken place. Likewise, the record contains insufficient facts to support Tomlee's belief that Florida Airmotive has diverted prospective service customers away from Tomlee or that Florida Airmotive has discriminated against aircraft that use the Tomlee service facilities. For example, the record shows that a visiting aircraft had turned into the Tomlee service area and Mr. Robinson went out to meet the aircraft and ascertain the services he desired. However, before he could engage in any conversation with the pilot, he heard the aircraft's Unicom advise that he was in the wrong service area and to turn around and come to the end of the taxi area where Florida Airmotive is located which instruction the pilot followed without further conversation with Mr. Robinson of Tomlee. Tomlee was unable to relate what or whose services the pilot had requested over the Unicom although Tomlee has two monitors for the Unicom frequency which enables it to receive both ends of a Unicom conversation. Thus it is unknown if this particular pilot, based on the record, was diverted from the Tomlee service area to those of Florida Airmotive, as Tomlee believes, or, he actually requested Florida Airmotive service and by mistake turned into the Tomlee service area, or, the pilot did not care who provided the services. Important and different decisional conclusions follow depending on what facts should be added to those of record on this incident, but, the record permits no such choice. Further, Tomlee referred to many or numerous incidents, but there is no evidence in the record which would support such claim.

CONCLUSIONS

1. While this is a comparative proceeding, it is considered necessary to consider first whether Tomlee has the basic qualifications to be a Commission licensee. It is recognized that there is no basic qualification

issue in this proceeding as that issue is normally understood. However, there is an issue to determine the "experience of applicant and employees in aviation and aviation communications". When this issue is considered with the ultimate issue in this proceeding—"to determine in the light of the evidence adduced on the foregoing issues which, if either, of the applications should be granted" a determination, based on this record, is required whether Tomlee is in violation of Section 301 of the Communications Act of 1934, as amended, (Act). See *S. W. White, et al.*, FCC 74R–14, Mimeo. No. 16475——FCC 2d——(1974).

2. Tomlee operated unlicensed transmitters aboard aircraft. Such operation cannot be considered an innocent oversight. It was willful from the inception. Mr. Robinson, the President of Tomlee has vast experience in radio and allied fields. He has been a licensed amateur operator for 27 years and he is fully aware of transmitter licensing requirements. Mr. Robinson, as the President of Tomlee, is considered as acting for the corporation. He knew that a fleet or individual license was necessary to cover the aircraft transmitters yet he determined to operate without such license. Tomlee was cited by the Commission for such unlicensed operation. Further, a Commission representative telephoned and advised such operation could not take place without some authorization. The Commission representative also advised how an STA could be obtained to regularize such unauthorized operation. Yet, nothing was done, except to file for a fleet license and assume it would arrive in due course, but, in the meantime it continued using the unlicensed transmitters. It eventually received the fleet license. Further, evidence of Tomlee's attitude toward the Act and Rules is its occasional operation on the Unicom frequency. Such operation required that it remove the authorized crystal from one of its two licensed transmitters and replace it with one tuned to 122.8 MHz. This modification created such a basic change in the transmitter licensed on another frequency that it can not be considered covered by even colorable license authority. Tomlee used the modified transmitter on several occassions.

3. Section 301 of the Act states in part, that "No person shall use or operate any apparatus for the transmission of energy or communications of signals by radio . . . . except under and in accordance with this Act and with a license in that behalf granted under provisions of this Act." Section 308 of the Act states that "The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefore received by it. . ."

4. Such provisions of the Act and the Rules which track the Act are essential as licensees must be held accountable to this Commission by means of the licensing procedure. It is clear that Tomlee and one of its officers has violated Section 301 of the Act and there appear no circumstances to mitigate such violation. Accordingly, Tomlee is found not qualified to be a licensee of the Unicom facility.[7]

5. There remains for consideration whether Florida Airmotive has the qualifications to be a licensee of a Unicom facility. Based on the record, it is concluded that Florida Airmotive has the necessary

[7] The qualifications of Tomlee, its officers and employees to hold licenses or permits in other Commission services involves facilities not at issue in this proceeding.

qualifications in terms of facilities, personnel, experience to provide the primary and secondary Unicom communications required at an uncontrolled airport, i.e., a landing area with no FAA control tower.

6. The primary issue with respect to Florida Airmotive is whether its past operations have been anti-competitive in nature and thus contrary to the public interest. Florida Airmotive regards the Unicom as its private corporate property and refuses to allow Tomlee a dispatch point. Florida Airmotive may have corporate ownership of the physical facilities for the Unicom but this does not permit service to be afforded to any user of the airfield on less than an impartial basis. Certain charges were made by Tomlee that Florida Airmotive has not afforded the required impartial service, and, that the Unicom has been used to secure a competitive advantage. It is concluded that based on the record such charges have not been proved. Had it been otherwise, it could have led to a possible denial of Florida Airmotive's application. See *S. W. White, supra.*[8]

7. Accordingly IT IS ORDERED, that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, the application of Florida Airmotive for an Aeronautical Advisory Station to serve Boca Raton Airport, Boca Raton, Florida IS GRANTED and the application of Tomlee for a like facility at Boca Raton Airport IS DENIED.

BYRON E. HARRISON,
Administrative Law Judge,
Federal Communications Commission.

[8] All aircraft taking-off or landing at uncontrolled airports must be afforded information on a non-discriminatory basis. Any use of Unicom facilities to further anti-competitive private business interests cannot be tolerated.

FCC 74-472

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF GARVIN COUNTY BROADCASTING, INC., LICENSEE OF RADIO STATION KVLH, PAULS VALLEY, OKLA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted May 1, 1974; Released May 7, 1974)

BY THE COMMISSION: COMMISSIONER QUELLO NOT PARTICIPATING.

1. The Commission has under consideration (1) its Notice of Apparent Liability dated April 18, 1973 (mailed April 19, 1973) issued to Garvin County Broadcasting, Inc., the licensee of Radio Station KVLH, Pauls Valley, Oklahoma and (2) the licensee's response thereto dated May 10, 1973.

2. The Notice of Apparent Liability for forfeiture in the amount of one thousand dollars ($1,000) was issued in this proceeding for apparent willful or repeated violations disclosed by an inspection on May 8, 1972. The violations as set forth in the Notice were as follows:

> An inspection of the records of Station KVLH on May 8, 1972 indicated that the top beacon of the station antenna structure was extinguished on or about February 1, 1971 and remained extinguished until the date of inspection, without notification to the nearest Flight Service Station or office of the Federal Aviation Administration (FAA), in violation of Section 17.48(a) of the Rules of the Commission. An inquiry made to the FAA office in Forth Worth, Texas indicated that no such notice to the FAA had in fact been given by you.
>
> The inspection also revealed that four side lights of the antenna structure were inoperative on November 11, 1971 and there was no evidence that that situation was corrected from that date to the date of inspection, in violation of Section 17.48(b) of the Commission's Rules. A report of the inspection indicated that all of the lights on the antenna structure were inoperative on the day of inspection.
>
> The inspection of the maintenance logs indicated that there were no entries of quarterly inspections of the condition of the tower lights and associated control equipment between February 1, 1971 and the date of inspection, in violation of Section 17.49(d) of the Commission's Rules.

The Notice also indicated in regard to these violations that the licensee stated that tower lights had been replaced on May 11, 1972, and that employees had been instructed to notify the FAA when a light was extinguished.

3. In response to the Notice of Apparent Liability the licensee states that "there is no way to justify the long period of time when the lights were out" and states that the licensee's vice president usually replaced inoperative lights when visiting the station. However, during the period of time cited in the Notice the licensee states that the vice president could not climb the tower for a number of reasons including high

winds, failure to have a safety belt on hand and illness. The licensee does not deny the violations of Section 17.49(d). However, it does deny that there was a failure to give the notice to the nearest Federal Aviation Administration (FAA) office or Flight Service Station required by Section 17.48(a). In this connection the licensee states that the notice was given by its station manager to the FAA Flight Service Station located in Oklahoma City which is nearer than the FAA Fort Worth, Texas office. The licensee has furnished a letter signed by the station manager at the time of the violation indicating that the required notice was given. The licensee also states that the amount of forfeiture is excessive for a small market station with a continuing loss operation, and that it has purchased a substantial amount of new equipment and has done a "good news and public affairs job." Licensee requests mitigation or remission of the forfeiture.

4. We find that the licensee repeatedly violated Section 17.49(d) of the Commission's Rules and repeatedly violated Section 17.48(b) of the Rules by not taking corrective action for extinguished side lights as soon as possible. *Radio Beaumont, Inc.*, 21 FCC 2d 303 (1970). Within the one year statutory period, the violations were repeated from April 19, 1972 to May 11, 1972. The licensee's financial condition was considered when the Notice of Apparent Liability was issued. Licensees are expected to make continued efforts to serve the community to which they are licensed and will not be relieved of liability for violations by the fact that they fulfilled their responsibility to serve their communities. *Esther Blodgett*, 18 FCC 2d 6 (1969); *Folkways Broadcasting Co.*, 12 FCC 2d 887 (1968). Regarding the violation of Section 17.48(a) of the Rules, an inquiry of the FAA Oklahoma City Flight Service Center revealed that there were no records retained by that office which would indicate whether notice was given by the licensee. Under the circumstances, we believe that the licensees should not be charged with the violation of Section 17.48(a) of the Commission's Rules and that the forfeiture should be reduced accordingly.

5. in view of the foregoing, IT IS ORDERED, That Garvin County Broadcasting, Inc., FORFEIT to the United States the sum of five hundred dollars ($500) for repeated violation of Sections 17.48(b) and 17.49(d) of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days from the date of receipt of a copy of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74–265

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of GENERAL TELEVISION OF MARYLAND, INC., SALISBURY, MD. For Certificate of Compliance	CAC–846 MD013

MEMORANDUM OPINION AND ORDER

(Adopted March 13, 1974; Released March 21, 1974)

BY THE COMMISSION:

1. WBOC, Inc., licensee of Station WBOC–TV, Salisbury, Maryland, has submitted a "Petition for Reconsideration" directed against the certificate of compliance granted in *General Television of Maryland, Inc.*, FCC 73–1172, 43 FCC 2d 864. This petition is opposed by General Television of Maryland, Inc., and WBOC–TV has replied.

2. In its petition WBOC–TV reiterates its arguments, fully discussed in the above-referenced decision, that the letter of notification sent by General in 1967 [1] was not adequate notice under the provisions of former Section 74.1105 to grandfather full-time carriage of five distant Washington, D.C. signals, that the Section 74.1105 notification was invalid because it was not served on the Commission, and that General's part-time carriage of the signals prior to March 31, 1972, was insufficient to establish grandfathered rights. In a subsequent pleading WBOC–TV suggests that if the Commission will not restrict its authorization to part-time carriage of these signals, then it should require WBOC–TV and General to negotiate a compromise.

3. We reject WBOC–TV's argument. WBOC–TV is merely restating arguments that have already been considered and rejected. The time for WBOC–TV to negotiate a compromise or to oppose General's carriage in reliance on its Section 74.1105 notification was in 1967. In the absence of an objection at that time, General was authorized to carry the Washington, D.C. signals full-time. This authorization did not depend on the amount of carriage of the signals before March 31, 1972, but on operation of the provisions of former Section 74.1105. *Cable Television Report and Order*, 36 FCC 2d 143, n. 58.

In view of the foregoing, the Commission finds that reconsideration of its action in *General Television of Maryland, Inc.*, FCC 73–1172, 43 FCC 2d 864, would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Reconsideration" filed December 18, 1973, by WBOC, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

[1] General's letter of notification stated that it intended to supplement its service by supplying five Washington, D.C. signals. It concluded that "It is not General's intention to carry all of these signals at the same time on its CATV systems, nor does it intend to carry all the programming broadcast by any one of these stations."

FCC 74-380

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of GILL CABLE, INC., UNINCORPORATED PARTS OF SANTA CLARA COUNTY, CAMPBELL, AND SAN JOSE, CALIF.	CAC-1393; CA212 CAC-1394; CA386 CAC-1395; CA213

For Certificates of Compliance

MEMORANDUM OPINION AND ORDER

(Adopted April 10, 1974; Released April 19, 1974)

BY THE COMMISSION: COMMISSIONERS REID AND HOOKS CONCURRING IN THE RESULT.

1. On October 15, 1972, Gill Cable, Inc., filed the above-captioned applications for certificates of compliance to add the signal of Television Boadcast Station KTXL, Sacramento, California (Channel 40, Ind.), to its existing cable television systems serving unincorporated parts of Santa Clara County, Campbell, and San Jose, California,[1] all located within the San Francisco-Oakland-San Jose, California, major television market (#7). The current signal carriage of these systems consists of the following:

California:
KCSM-TV (educational, channel 14), San Mateo.
KUDO (independent, channel 38), San Francisco.
KTVU-TV (independent, channel 2), Oakland.
KRON-TV (NBC, channel 4), San Francisco.
KPIX (CBS, channel 5), San Francisco.
KGO-TV (ABC, channel 7), San Francisco.
KQED (educational, channel 9), San Francisco.
KBHK-TV (independent, channel 44), San Francisco.
KEMO-TV (independent, channel 20), San Francisco.
KTEH-TV (educational, channel 54), San Jose.
KGSC-TV (independent, channel 36), San Jose.
KNTV (ABC, channel 11), San Jose.
KMST (CBS, channel 46), Monterey.
KSBW-TV (NBC, channel 8), Salinas.
KXTV (CBS, channel 10), Sacramento.
KCRA-TV (NBC, channel 3), Sacramento.
KOVR (ABC, channel 13), Stockton.

[1] See the following:

Community:	Population
Santa Clara County (includes Campbell and San Jose)	1,057,032
Campbell	24,204
San Jose	439,965

Carriage of the above-listed signals is consistent with Section 76.65 of the Rules. Gill Cable asserts the right to carry KTXL pursuant to Section 76.61(c) of the Rules. The applications are opposed by Continental Urban Television Corporation, licensee of Station KGSC–TV, San Jose, California.

2. KGSC–TV argues that Gill Cable's current carriage of five distant network signals (KMST, KSBW–TV, KXTV, KCRA–TV, and KOVR) should be counted against its quota of distant independent signals and therefore carriage of KTXL should be denied. KGSC–TV cites Paragraph 90 of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 177 (1972), and argues that "[t]he drafters of § 76.61(c) obviously intended that all distant signals be included within the phrase 'signals added to the system pursuant to paragraph (b) of this section'." Additionally, KGSC–TV asserts that it is financially unable to withstand further competition from an additional distant signal.

3. In "Comments" filed in support of Gill Cable, Camellia City Telecasters, Inc., licensee of Television Broadcast Station KTXL, Sacramento, California, asserts that the existing and proposed carriage is consistent with Section 76.61, that none of these disputed distant network signals were added pursuant to Sections 76.61(b) or (c), and furthermore, that these five signals designated as distant under the current rules were considered local signals under the old cable television rules, and, accordingly, their carriage was mandatory upon appropriate request. Therefore, they were not added to the system for the purpose of meeting the "minimum standards" of Section 76.61 (b), which in turn should allow the carriage of KTXL on these three systems.

4. We reject KGSC–TV's arguments. In *Sammons Communications, Inc.*, FCC 73–363, 40 FCC 2d 461 (1973), we dealt with the argument concerning the application of Sections 76.61 and 76.65. There the cable system proposed a full complement of local network signals in addition to four grandfathered distant network signals. We held that since the cable system was not proposing the distant network signals to meet the "minimum service" requirements of Section 76.61(b) of the Rules, but rather proposed to carry them on the basis of their grand-fathered status, those signals do not count against the bonus distant independent signals of Section 76.61(c) of the Rules. We therefore find Gill Cable's proposed carriage of KTXL to be consistent with Section 76.61(c) of the Rules.

5. We must also reject KGSC–TV's argument that it is financially unable to withstand further competition. Since Gill Cable's proposed carriage of KTXL is consistent with the Rules, KGSC–TV's financial impact argument must essentially be considered a request for special relief. However, in Paragraph 113 of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 187 (1972), we explained that "there must be a substantial showing to warrant deviation from the go, no-go concept of the Rules." The "substantial showing" standard was clarified in *Gerity Broadcasting Co.*, FCC 72–651, 36 FCC 2d 69 (1972), in which we held that such showings must "contain specificity of fact showing injury to the public" before special relief could be granted. *See See-More Cable TV of Sikeston, Inc.*, FCC 73–769, 42

FCC 2d 261 (1973); *Fort Smith TV Cable Co.*, FCC 73–151, 39 FCC 2d 573 (1973); *Spectrum Cable Systems, Inc.*, FCC 73–257, 40 FCC 2d 1019 (1973), *recons. denied*, FCC 73–1342, 44 FCC 2d 867 (1973).[2] KGSC–TV's bare allegation of financial impact falls short of this requirement, and is too speculative to warrant special relief. Where there are objections to carriage consistent with the Rules or claims for special relief based on financial inability to withstand additional competition, these claims must be supported by specific financial data. No such data has been submitted herein.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Opposition to Applications for Certificates of Compliance," filed December 22, 1972, by Continental Urban Television Corporation, IS DENIED.

IT IS FURTHER ORDERED, That Gill Cable, Inc.'s, applications (CAC–1393, 1394, 1395) ARE GRANTED, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[2] Appeal pending *sub nom. Springfield Television Broadcasting Corp.* v. *F.C.C.*, Case Nos. 74–1214, 1215, D.C. Circuit, and *The WHYN Stations Corp.* v. *F.C.C.*, Case Nos. 74–1216, 1217, D.C. Circuit.

104–038—74——7

FCC 74R–168

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of JIMMIE H. HOWELL, MILTON, FLA.	Docket No. 19882 File No. BP–19402
H. BYRD MAPOLES, TRADING AS MAPOLES BROADCASTING CO., MILTON, FLA.	Docket No. 19883 File No. BP–19403
AARON J. WELLS, MILTON, FLA.	Docket No. 19884 File No. BP–19430
RADIO SANTA ROSA, INC., MILTON, FLA. For Construction Permits	Docket No. 19885 File No. BP–19431

MEMORANDUM OPINION AND ORDER

(Adopted May 7, 1974; Released May 9, 1974)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT.

1. This proceeding involves the mutually exclusive applications of Jimmie H. Howell (Howell), Mapoles Broadcasting Company, Aaron J. Wells (Wells), and Radio Santa Rosa, Inc. (Santa Rosa) for authority to construct a new standard broadcast station in Milton, Florida. The applications were designated for hearing by Commission Order, 44 FCC 2d 43, released December 4, 1973, on a Rule 1.65 issue against Howell [1] and a standard comparative issue. Now before the Review Board is a petition to enlarge issues, filed December 26, 1973, by Santa Rosa,[2] seeking the addition of a *Suburban* issue against Wells and several issues against Howell, including character, misrepresentation and Rule 1.514 issues.

THE WELLS APPLICATION

2. Santa Rosa alleges that Wells' *Suburban* showing is deficient in that Wells submitted an inadequate demographic showing; made superficial contacts with numerous community leaders, both in Milton, Florida and the surrounding area; and failed to elicit the special problems of several significant groups, *i.e.*, youth leaders and black leaders. Santa Rosa also alleges that Wells' proposed programming is inadequate to meet its ascertained community problems.[3] In support, Santa Rosa states that Wells' demographic showing is a "mechanistic

[1] By Memorandum Opinion and Order, released January 17, 1974, (—— FCC 2d ——, 29 RR 2d 349) the Board denied Howell's request to delete the Rule 1.65 issue.

[2] Also before the Board are: (a) comments filed January 24, 1974, by the Broadcast Bureau; (b) an opposition, filed January 25, 1974, by Howell; (c) an opposition, filed January 25, 1974, by Wells; (d) erratum, filed January 28, 1974, by the Broadcast Bureau; and (e) a reply, filed February 15, 1974, by Santa Rosa.

[3] In its petition, Santa Rosa also alleges other deficiencies in Wells' *Suburban* showing, including Wells' failure to interview representatives of certain significant groups and his failure to conduct an adequate survey of the general public. By Memorandum Opinion and Order, released February 11, 1974, the Administrative Law Judge granted a petition for leave to amend, filed by Wells on January 25, 1974, which included additional efforts

reproduction", without comment, of chamber of commerce information; that the Commission did not contemplate that the chamber of commerce would be the sole source of demographic information upon which an applicant would base its ascertainment survey, citing Paragraph 17 of the Commission's Report and Order adopting the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971);[4] and that this data is inadequate, citing *Morris's Incorporated*, 44 FCC 2d 321, 28 RR 2d 1723 (1973); and *Robert Cowan Wagner*, 38 FCC 2d 403, 405, 25 RR 2d 1095, 1097 (1972).[5] Santa Rosa alleges that Wells' contacts with leaders outside of Milton are inadequate since only two interviews were conducted in Pace, Florida, the second largest community outside of Milton, and these were superficial; that only four leaders were interviewed in Gulf Breeze and their responses were superficial; and that five leaders were interviewed in Jay, which is beyond Wells' projected 0.5 mv/m contour, and their responses focused on radio communication. According to Santa Rosa, Wells' entire community leader survey is deficient since in most cases "only one or two needs—if any—were elicited from each interviewee." Specifically, Santa Rosa states that five leaders merely offered suggestions relating to radio communication in Milton and several gave short, incomprehensible answers such as "lack of cooperation" and need for "more togetherness and understanding". Santa Rosa argues that "this is not the substantive 'dialogue' which the ascertainment process was designed to establish."

3. Santa Rosa next alleges that none of the problems elicited by Wells from black leaders related "specifically to the black community of Milton", even though the black population of Milton is, according to petitioner, 9.3%. This fact, petitioner urges, also constitutes a deficiency in the showing, citing *Harry D. Stephenson and Robert E. Stephenson*, 33 FCC 2d 749, 23 RR 2d 760 (1972). Santa Rosa also states that Wells' interviews with youth leaders failed to elicit any problems since both responses from youth leaders related to programming and not community problems. Finally, Santa Rosa asserts that Wells' proposed programming is inadequate to meet ascertained problems for the following reasons: (a) three of Wells' proposed seven programs are religious programs, but Wells' survey did not indicate that religious programming is needed in Milton, Florida, citing *Childress Broadcasting Corp.*, 37 FCC 2d 766, 25 RR 2d 711 (1972); (b) Wells proposes numerous programs dealing with youth problems

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by Wells to ascertain community needs. In its reply pleading, Santa Rosa concedes that several flaws in Wells' showing have been cured by Wells' *Suburban* amendment, but argues that other deficiencies remain. In the Board's view, Wells' January 25th amendment moots several of Santa Rosa's allegations regarding Wells' *Suburban* showing and since Santa Rosa does not discuss these matters in its reply pleading, they will not be discussed herein.

[4] In its Report and Order adopting the *Primer, supra*, the Commission stated that " . . . listing the chamber of commerce as one source of data does not lead to the conclusion that it should be considered the sole source of information." 27 FCC 2d at 661, 21 RR 2d at 1518. Q. & A. 9 of the *Primer* provides that an applicant may use any method to determine the composition of the city of license, excluding guesswork or personal familiarity with the area, and that data from the U.S. Census Bureau, chamber of commerce and other reliable sources are acceptable.

[5] The chamber of commerce publication used by Wells is entitled "Grow it, Make it, Sell it . . . Easier in SANTA ROSA COUNTY, Florida" and consists of 34 pages. The publication includes information and statistics on numerous subjects including population, banking, industry, labor, income, health and taxes.

while Wells' interviews with youth leaders were inadequate; and (c) Wells proposes one weekly half-hour program to deal with the remaining problems and needs of the community which is clearly insufficient and unacceptable. In sum, Santa Rosa argues that Wells' "*Suburban* showing taken as a whole lacks an overall good-faith effort to ascertain the community's needs and to propose programming addressed thereto." Both Wells and the Broadcast Bureau oppose the addition of the requested *Suburban* issue.

4. The Review Board will deny the requested *Suburban* issue. Initially, we do not agree with Santa Rosa's contention that Wells' demographic showing is fatally defective since he relied solely upon chamber of commerce data. Wells states that he did not simply reproduce chamber of commerce information, but rather analyzed the data and used it to understand the demographic composition of Milton. As noted by the Bureau, Santa Rosa does not allege nor demonstrate that Wells' demographic showing is, in fact, inadequate, incomplete, or erroneous in any respect. Further, Santa Rosa's reliance upon *Morris's Incorporated*, *supra*, and *Robert Cowan Wagner*, *supra*, is misplaced.[6] In the Board's view, Wells has supplied adequate demographic information as required by the *Primer*, *supra*, Q. & A. 9 (see note 4, *supra*). Regarding Wells' survey of community leaders, both in and outside the city of Milton, the Review Board is satisfied that Wells made a good faith effort to consult with leaders of significant groups within its proposed service area and did, in fact, achieve a "substantive dialogue" with community leaders, contrary to the assertions of Santa Rosa. We do not agree with Santa Rosa that Wells' failure to elicit more than one or two problems from several community leaders constitutes "bad faith" or a violation of the *Primer*. The *Primer* does not require an applicant to elicit a specific number of problems from community leaders and nothing in Wells' application or the pleadings indicates that Wells acted in "bad faith" while conducting his interviews with community leaders.

5. Regarding Wells' contacts outside Milton, Florida, although it appears that Jay, Florida is outside of Wells' projected 0.5 mv/m contour, we believe that Wells interviewed a sufficient number of community leaders in areas within his proposed 0.5 mv/m contour to obtain a "broad overview of community problems" in "other areas" as required by the *Primer*, Q. & A. 7, 27 FCC 2d at 683, 21 RR 2d at 1543.[7] Although Wells' contacts with youth leaders, *i.e.*, the president and vice-president of the Student Body of Milton High School, elicited program preference responses, Wells' contacts with leaders familiar with the problems of youth[8] elicited numerous youth problems. The Board finds Santa Rosa's argument that Wells failed to elicit problems

[6] In both cases, the Board concluded that the applicants' demographic showings were inadequate because they failed to supply adequate demographic information regarding their proposed cities of license and not because the applicants had relied upon chamber of commerce data. Thus, the fact that the applicants had relied extensively upon chamber of commerce information was not determinative, but rather their failure to provide adequate demographic information rendered their surveys defective. Such is not the case here, however.

[7] In this regard, Wells interviewed persons in Bagdad, Pace, Gulf Breeze and Magnolia Heights, Florida.

[8] These leaders included: Lee Zimmerman, Intake Counselor, Division of Youth Services, State of Florida; Bill Masey, Director at Pensacola Junior College, Milton Center; Radford M. Locklin, Superintendent of Schools, Santa Rosa County, Milton, Florida; and Theodis Jackson, Principal, T. R. Jackson Elementary School.

from black leaders which were exclusively related to the black community, without merit. The *Primer*, Q. & A. 18, merely requires that an applicant "ascertain what the person consulted believes to be the problems of the community from the standpoint of a leader of the particular group or organization." 27 FCC 2d at 685, 21 RR 2d at 1545. Thus, as long as an applicant makes a good faith effort to elicit community problems, the *Primer's* requirements are satisfied. Furthermore, Santa Rosa does not allege that an insufficient number of black leaders were contacted and, in our view, Wells adequately surveyed the needs and interests of the black community.[9]

6. Finally, we find no merit to Santa Rosa's allegations regarding Wells' proposed programming. Wells proposes to devote two hours and fifteen minutes per week to public affairs programming, excluding news and religious programming, to meet the needs and problems he ascertained in his community survey. These public affairs programs include "Public Affairs Forum", which will deal with civic planning, drug problems, zoning and other problems; "Our Government," which will concern various community problems as they arise; "The Voice of Youth", which will encourage "youth involvement in constructive, worthwhile community activities," and "Milton Monitor", which will deal with numerous local problems and needs, including trash removal and control of stray dogs. In addition, Wells proposes several daily religious programs which, according to Wells, will concentrate on youth problems, especially the lack of moral values and ideals. The need for moral values and ideals in youth was a community problem ascertained by Wells in his community survey and listed by him as one of several significant ascertained problems. In the Board's view, Wells' proposed programming, including his proposed religious programming, is adequate to meet the problems elicited by Wells in his surveys. We know of no requirement in the *Primer* which states that an applicant must detect a need for religious programming before adopting a religious format. *Cf. Gross Telecasting, Inc.*, FCC 74–374, —— FCC 2d ——, released April 22, 1974 (para. 12). The *Primer* requires that an applicant "make a positive, diligent and continuing effort to meet community problems", 27 FCC 2d at 686, 21 RR 2d at 1547, and, in our view, Wells' proposed religious programming, together with his proposed public affairs and news programming, is designed to achieve the purposes set out in the *Primer*.[10] In light of the above, the requested *Suburban* issue will be denied.

THE HOWELL APPLICATION

7. *Character Issue.* Next, Santa Rosa requests issues inquiring into the facts and circumstances surrounding a criminal indictment re-

[9] Santa Rosa's reliance upon *Harry D. Stephenson and Robert E. Stephenson, supra*, is also misplaced. In that case, the Board concluded that an applicant had not met his obligations under the *Primer* where it had failed to contact leaders from several significant groups. Here, Santa Rosa does not allege that Wells failed to contact black leaders, but rather that it disagrees with Wells' method of eliciting community problems.

[10] *Childress Broadcasting Corp., supra*, mistakenly relied upon by Santa Rosa, does not hold that an applicant must ascertain a specific need for religious programming. In *Childress*, the Board held that an applicant's proposed programming, including religious programming, was set forth in generalized terms contrary to Q. & A. 24 of *Primer* and, thus, lacked "the specificity required by the Primer" 37 FCC 2d at 772, 25 RR 2d at 718.

turned against Howell. By way of background, in its designation Order *supra*, the Commission indicated that Jimmie Howell, a Santa Rosa County Commissioner, was indicted by the Santa Rosa Grand Jury on April 20, 1973, for allegedly soliciting a $4,000 bribe in connection with the awarding of county contracts. The Commission stated that it was unable to determine at the time of designation (*i.e.*, November 1973) "whether he [Howell] has the requisite qualifications to be a broadcast licensee." The Commission therefore ordered that if the Presiding Judge concluded that Howell was the preferred applicant, he should withhold an Initial Decision until notified of the result of the criminal proceedings. The Commission further ordered that if the Judge learned that Howell had *not* been acquitted, then he "shall add further issues and hold such further proceedings as may be necessary to determine Howell's qualifications to be a licensee of the Commission." Howell was tried on the charge and found "not guilty" on November 20, 1973. On January 8, 1974, at a prehearing conference, the Presiding Judge ruled that in light of Howell's acquittal, no further inquiry into the matter was warranted. Santa Rosa now requests that the Board specify an appropriate issue to inquire into Howell's criminal indictment in light of the recent Court of Appeals decision in *TV 9, Inc.* v. *FCC*, —— F. 2d ——, 28 RR 2d 1115 (D.C. Cir. 1973).[11] According to Santa Rosa, Howell's conduct must be assessed in light of the "public interest standard" irrespective of whether "a jury was convinced beyond a reasonable doubt that Howell had technically [not] violated the Florida criminal code."

8. Both Howell and the Broadcast Bureau oppose the addition of the requested issues. Howell argues that the allegations are not supported by affidavits as required by Rule 1.229(c) and that *TV 9, Inc.* v. *FCC*, *supra*, is distinguishable from the instant case. The Bureau argues that the entire matter was thoroughly considered by the Commission in its designation Order, *supra*, and that the Commission at that time "*specified* the exact conditions which would give rise to an inquiry into the facts and circumstances underlying Howell's previous indictment."

9. The Review Board will deny the requested issues relating to Howell's criminal indictment. In our view, the Court's decision in the

[11] In *TV 9, Inc.*, *supra*, a principal of an applicant who was also the secretary, a director and the applicant's general counsel, was indicted by a federal grand jury on November 1, 1969, on charges of, *inter alia*, illegal gambling activities. On November 9, 1971, the applicant informed the Commission that the principal had resigned his position because of a poor physical condition which also resulted in the dismissal of the indictment. The Commission permitted the applicant to amend to its application to reflect that the principal was divested of all authority and ruled that since the principal was no longer associated with the applicant, it was relieved of responsibility for any misconduct on his part. The Commission's ruling mooted a petition to reopen the record filed by other parties to inquire into the effect of the alleged criminal activities on the applicant's character qualifications. The Court ruled that the Commission did not err in accepting the amendment, but did err in mooting the significance of the facts surrounding the criminal indictment since:

"A determination by the Commission with respect to this matter does not depend upon the outcome of a trial on an indictment, which we are now advised is beyond the possibilities because of Mr. Segal's physical condition. Proof of guilt of crime is required to be established to the satisfaction of the fact-finder beyond a reasonable doubt. Even a verdict of not guilty under this standard, though relevant, is not decisive of the character qualifications of an applicant under the standard of public interest relevant to comparative broadcasting responsibility among several applicants under the Communications Act. Furthermore, the presumption of innocence which accompanies one charged but not convicted of crime is not a bar to consideration of the charges in this civil proceeding under the standard of the public interest. —— F. 2d at ——, 28 RR 2d at 1129–30."

TV 9 case, *supra*, does not mandate that the Commission inquire into the facts and circumstances surrounding *every* criminal proceeding involving a prospective broadcast licensee, especially where, as here, the defendant is subsequently found innocent of wrongdoing by a jury. There is nothing in the Court's decision requiring the Commission to completely abandon its procedural rules (*e.g.*, Rule 1.229(c)),[12] and indiscriminately order inquiries into *all* criminal proceedings simply because a prospective broadcast applicant is indicted, tried and ultimately acquitted of an alleged criminal activity. And, we do not believe the Court intended such a result. Specifically, Santa Rosa offers no support, affidavits or otherwise, for its requested issues other than a copy of the very brief April 20, 1973, grand jury indictment.[13] Since Howell was subsequently acquitted of the charge, we believe that the indictment, standing alone, is insufficient to warrant an evidentiary inquiry and that Santa Rosa was under an obligation under our Rules to demonstrate that Howell would be unfit to be a Commission licensee. *Cf. Philco Corp.* v. *FCC*, 110 U.S. App. D.C. 387, 293 F. 2d 864, 21 RR 2079 (1961); *RKO General, Inc.* (*KHJ–TV*), 8 FCC 2d 632, 10 RR 2d 282 (1967). Moreover, it is well established that the Commission is not concerned with the indictment or suit *per se* but rather the facts and conduct underlying the indictment, see *Spanish International Television Company, Inc.*, 45 FCC 1384, 9 RR 2d 853 (1964), and nothing in *TV 9, Inc.* v. *FCC*, changes this standard. Santa Rosa clearly failed to show that serious questions regarding Howell's character qualifications are still present, and, in our view, the Court did not contemplate an evidentiary inquiry absent such a showing by the petitioning party. Accordingly, the requested issues will be denied.

10. *Misrepresentation and Rule 1.514 Issue.* Santa Rosa finally alleges that Howell indicated in his application that he was a 30 percent owner of Radio Milton, Inc., the licensee of Station WSRA, Milton, Florida, from June, 1967, until November, 1969, when he disassociated himself from the station;[14] that Howell continued to serve as "General Manager and Engineer" of Station WSRA, as well as commonly-owned Station WONF–FM, Pensacola, Florida (now WBOP–FM) until April, 1970;[15] and that Howell's failure to disclose this information constitutes a violation of Rule 1.514 and a material misrepresentation in view of Howell's role in WSRA.[16] Santa Rosa

[12] Rule 1.229(c) provides, in pertinent part, that motions to enlarge issues shall contain *specific* allegations of *fact* and shall be supported by affidavits of a person or persons having personal knowledge thereof.

[13] The entire indictment reads as follows: "JIM HOWELL, then and there being a county officer, did then and there corruptly and unlawfully request or solicit a gift or gratuity, to-wit: money, under an agreement or with an understanding with J.B. (Jim) Pittman, that his vote, opinion or judgment shall be given in any particular manner or upon a particular aside of any question, cause or proceeding which was by law brought before him in his official capacity, contrary to Florida Statute 838.02."

[14] However, Howell's application indicates the following: "30% Radio Milton Inc., June 1967 to April 1970."

[15] In support, Santa Rosa submits the minutes of a meeting of West Florida Broadcasting Co., Inc., the then 70 percent owner of Radio Milton, Inc., evidencing Howell's agreement to serve as General Manager and Engineer of both stations, and Howell's letter of resignation, dated March 31, 1970.

[16] WSRA's renewal application was designated for hearing by Commission Order, released July 11, 1973. The complaint leading to the application's designation concerned WSRA's activities during the period when Howell was Manager and Engineer at WSRA, including an allegation that WONF–FM was causing interference with another station. Further, the Bureau's Bill of Particulars, filed August 13, 1973, indicates that the interference may have been intentional. The licensee, however, did not prosecute its renewal application through the hearing process.

also alleges that the transfer of Howell's 30 percent interest in Radio Milton was not reported to the Commission for over a year and his "constructive, if not actual knowledge of the failure to file this information could reflect adversely on Howell's comparative qualifications." The Bureau supports addition of the requested issues, absent a satisfactory explanation by Howell in his respective pleading. The Bureau notes that Howell did not disclose any relationship with West Florida Broadcasting Co., Inc., the former licensee of WONF–FM, in his application and that an explanation is required "in light of Howell's possible involvement in rule violations while manager and engineer of WONF–FM."

11. Howell opposes addition of the requested issues. Howell argues that WONF–FM "which was commonly owned and housed and operated out of the same building [as WSRA] was always considered part of WSRA;" that the failure of the licensee to report the sale of his 30 percent interest in WSRA to the Commission in a timely manner is of "no legal consequence to him" since Rule 1.613 of the Commission's Rules places the responsibility for reporting changes in ownership upon the licensee; and that there is no basis for adding the requested issues.

12. The Review Board believes that a substantial question has been raised regarding Howell's compliance with Rule 1.514 which warrants a full evidentiary inquiry. We agree with Howell that his association with Radio Milton, Inc., the licensee of Station WSRA, from June 1967 through April 1970, was fully reported in his application, and, thus, cannot be the basis for the addition of a Rule 1.514 issue. (See note 14, *supra.*) However, we do not agree that since WONF–FM was allegedly "always considered part of WSRA", Howell's association with WONF–FM, Pensacola, Florida did not have to be reported in the application. In our view, WONF–FM is a separate broadcast facility and Howell's association with this station as well as WSRA should have been reported at the time Howell filed his application. Moreover, it appears that Howell may have had a motive to conceal his association with WONF–FM since Howell was apparently the manager of the station during the time the station was causing interference to another station. Since we are unable to determine, on the basis of the pleadings, whether Howell's interest in WONF–FM was intentionally concealed, we will specify the Rule 1.514 issue on a disqualifying, as well as a comparative basis. See *Folkways Broadcasting Co., Inc.*, 40 FCC 2d 839, 21 RR 2d 211 (1971); *Sumiton Broadcasting Co.*, 20 FCC 2d 669, 17 RR 2d 1038 (1969).[17]

13. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed December 26, 1973 by Radio Santa Rosa, Inc., IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and

14. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by the addition of the following issue:

To determine whether Jimmie H. Howell complied with Section 1.514 of the Commission's Rules regarding his past associa-

[17] However, Santa Rosa's request for a misrepresentation issue will be denied. The question of intent may be fully examined under the Rule 1.514 issue being specified herein.

tion with Station WONF–FM, Pensacola, Florida, and, if not, to determine the effect thereof on Howell's basic and/or comparative qualifications to be a Commission licensee.

15. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of the evidence SHALL BE on Radio Santa Rosa, Inc., and the burden of proof SHALL BE on Jimmie H. Howell.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-401

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of INTERNATIONAL RECORD CARRIERS' SCOPE OF OPERATIONS IN THE CONTINENTAL UNITED STATES INCLUDING POSSIBLE REVISIONS TO THE FORMULA PRESCRIBED UNDER SECTION 222 OF THE COMMUNICATIONS ACT	Docket No. 19660 RM-690

MEMORANDUM OPINION AND ORDER

(Adopted April 16, 1974; Released May 3, 1974)

BY THE COMMISSION:

1. By Memorandum Opinion and Order released November 26, 1973,[1] the Commission specified the issues for hearing on the request of The Western Union Telegraph Company (WU) for an increase in the prescribed division of charges received by it for the landline handling of outbound and inbound international telegraph message traffic. In order to expedite the hearing, as previously ordered,[2] our November Order also provided for a two-part procedure in the conduct of the hearing: the first to determine the reasonableness of the present division of charges and the revenue requirements of WU in connection therewith; the second, if it were determined that WU was entitled to an increase, to determine whether part or all of the increase should be absorbed by the international record carriers (IRC's) or be reflected in their charges made to the public.

2. The issues upon which the hearing was ordered were:

(a) Whether the current divisions of charges between Western Union and the international record carriers for the landline handling by Western Union within the Continental United States of outbound and inbound international telegraph message traffic is unjust, unreasonable, inequitable, or otherwise not in the public interest.

(b) In connection with (a) above—(1) What are the revenues, expenses and investment properly attributable to the landline handling by Western Union of international telegraph messages, both currently and for a reasonable future period of at least one year? (2) On the basis of (b)(1) above, what changes, if any, in the levels and structure of the current divisions of charges are required to meet Western Union's revenue requirements for the period mentioned in (b)(1) above?

(c) What are, or will be, the effects of any increases in the divisions of charges that may be found to be required under (b)

[1] 43 F.C.C. 2d 1171.
[2] 43 F.C.C. 2d 661 (Oct. 30, 1973).

(2) above, on the revenue and rates of return of the respondent international carriers, assuming that such increases are absorbed by them?

(d) Whether the effect of any increases on the respondent international carriers is such as to warrant an increase in international public message charges to the public and, if so, the amount or amounts thereof and the effect of such increases on the volume of international message traffic and the revenues resulting therefrom both to Western Union and the respondent international record carriers.

(e) On the basis of findings and conclusions reached on the above issues, what changes, if any, in the current divisions of charges and/or charges to the public, should be prescribed by the Commission which will be just, reasonable and in the public interest?

3. We now have before us numerous pleadings filed by the carriers and the Trial Staff of the Common Carrier Bureau, seeking various forms of relief. In total, some twenty-eight separate pleadings have been filed.[3] Three of these requested extensions of time within which to file pleadings.[4] Of the remainder, six requested specific changes in issues or procedures with regard to the hearing, and the remaining nineteen were responses to the issues raised in these six. Because of this large number of pleadings, we will individually dispose of the initial substantive pleadings of each party and the procedural issues raised in subsequent filings. However, while we will consider and act upon the principal points raised in the many responsive pleadings, we will not attempt to deal with each issue that has been raised.

4. The initial pleading filed in this portion of the proceeding was by WU,[5] which principally contended that the bifurcated hearing procedure would lead to undue delay in the resolution of the issues and unfairly subject WU to additional delays in receiving the increased payments it seeks. Since Section 1.106(a)(1) of the Commission's Rules [6] proscribes our entertaining a petition to reconsider hearing procedures, this portion of the petition must be dismissed as unauthorized.[7] The separated Trial Staff joins WU's request to modify procedures,[8] and likewise this pleading is dismissed in part as unauthorized.

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[3] The Appendix hereto lists the pleadings now before us.

[4] We granted the motions for extensions of time filed by WUI on January 8 and February 27, 1974 by Order, FCC 74M-39, released January 10, 1974 and Order released March 1, 1974, respectively. The motion filed before the Review Board on December 22, 1973 is granted herein.

[5] Motion to Amend or Delete Issues dated November 30, 1973.

[6] "Petitions requesting reconsideration of a final Commission action will be acted on by the Commission. Petitions requesting reconsideration of a final decision of the Review Board will be acted on by the Board or certified to the Commission (see Section 0.361(b) and (c) of this chapter). Petitions requesting reconsideration of other final actions taken pursuant to delegated authority will be acted on by the designated authority or referred by such authority to the Commission. A petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding. Petitions for reconsideration of other interlocutory actions will not be entertained."

[7] Initially, WU also objected to the requirement that it provide projections of revenue requirements for a full year. In its Reply dated December 26, 1973, the company abandons this argument, and we thus consider moot the portions of the following pleadings which debate our forecast requirement: the oppositions to motions to Amend or Delete Issues dated December 13, 1973 filed by WUI, ITT and RCA.

[8] Motion of Trial Staff to Amend Procedures and to Oppose Deletion of Issues dated December 10, 1973.

5. By contrast, three of the international carriers, Western Union International, Inc. (WUI), ITT World Communications, Inc. (ITT), and TRT Telecommunications Corp. (TRT) [9] endorse the two-stage hearing as ordered, insisting that the Act (Section 222(e)(3)) gives them the right to a full hearing on the question of payouts to WU, but contending that they should not be required to present their evidence unless and until it is first determined that WU is entitled to an increase. Since the initial pleadings on this matter are unauthorized, these responsive filings are dismissed as moot. However, in light of our expressed desire to expedite a resolution of this case, we have carefully considered the effect of the hearing procedures and have modified them as provided herein.

6. RCA Global Communications, Inc. (RCA) and ITT request us to change issue (c) as set for hearing.[10] They argue that if WU's showing in support of its claims for additional landline haul charges is to be based upon analysis of WU's financial picture only with respect to landline haul, then the international carriers' financial condition should be examined only as it bears directly on public message services (PMS), rather than overall. WU observes,[11] however, that it will submit overall financial data and requests that the inquiry include consideration of the IRC's overall financial situation.

7. Upon careful consideration, we have concluded that the impact of any increased payouts to WU should be examined for present purposes in the context of the IRC's overall financial picture. To look only to public message services would involve, in all likelihood, extensive delays for the preparation, presentation, and testing of a system of cost allocation. We recognize that the IRC's may wish to argue that their PMS rate of return is well below that of their overall return and that further costs would reduce that return even further. However, we believe it inappropriate to delay granting any necessary increases to WU while such a complex question is litigated. If the IRC's wish to pursue that argument, they may do so in a separate proceeding upon due application for increased PMS rates, should we determine that their overall operating results are such to justify their absorption of any increases granted to WU.

8. We have been requested to add twelve issues to those set for hearing by petition of WUI.[12] Each of these issues was before the Commission prior to release of the November Order and was carefully considered at that time. We are aware that WUI was placed under severe time constraints in developing the list of issues and was unable to submit supporting arguments. However, as stated above, Section 1.106 of the Rules limits those matters upon which petitions for reconsideration may be entertained, and this petition must be viewed as asking for reconsideration of our previous rejection of these as hearing issues. This pleading is therefore dismissed as unauthorized, as requested by the Trial Staff.[13] Further, we reiterate our desire to

[9] Oppositions dated December 13, 1973.
[10] Motion for Change of Issues, filed by RCA, dated December 13; Motion to Change Issues, filed by ITT, dated December 5, 1973.
[11] Western Union's Opposition to ITT Worldcom's Motion to Change Issues dated December 14, 1973.
[12] Motion to Amend Issues dated December 14, 1973.
[13] Trial Staff Opposition to WUI Motion to Amend Issues and TRT Petition to Enlarge Issues dated February 14, 1974.

narrow the issues of this inquiry to the extent possible in the hope that the hearing can be brief and a decision expedited. Therefore, if we were to consider the WUI pleading on its merits, we would again deny the relief requested.

9. A final issue change, requested by TRT,[14] is the addition of free direct access to non-gateway customers by the IRC's. This question was also among those considered prior to the November Order, and therefore Section 1.106 renders the pleading unauthorized. We note as well that this issue was before us earlier in 1973. At that time we suggested that the international carriers could apply for authorization to gain direct access to the hinterland.[15] No such applications have been filed, and this pleading cannot be considered a substitute.

10. In addition to the issue changes requested by the parties in this case, and treated above, a number of the pleadings [16] addressed themselves to the procedural question of whether the Commission or the Review Board was the proper forum to hear this round of pleadings. Both WUI and TRT contend that this proceeding is mixed adjudication and rulemaking rather than pure rulemaking and that Section 0.365(b) of the Rules [17] requires interlocutory matters in such mixed proceedings to be heard by the Review Board. The Trial Staff and WU, on the other hand, allege that this case is entirely rulemaking and that the pleadings are properly addressed to the Commission. The Review Board agreed with WU and the Trial Staff and, by Memordanum Opinion and Order released February 4, 1974,[18] certified all pleadings filed before it to the Commission.[19] We concur with the Review Board's decision and adopt the reasoning expressed in its Order that the Commission is the proper forum to hear interlocutory matters in this proceeding

11. In addition to those discussed above, we are dismissing two pleadings as unauthorized under Section 1.45(a)–(c) of the Rules.[20] WUI's Petition to Strike dated December 13, 1973 is only authorized if considered an opposition to other pleadings. However, since the com-

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[14] Petition of TRT Telecommunications Corp. to Enlarge Issues dated December 13, 1973.

[15] 40 F.C.C. 2d 1082.

[16] Oppositions of WUI and TRT dated December 13, 1973; Opposition of the Trial Staff dated December 28, 1973; Reply of Western Union dated December 26, 1973; Statement of Trial Staff dated December 27, 1973; Opposition of TRT dated January 8, 1974 and Opposition of WUI dated January 11, 1974. We note that the Motion of Trial Staff to Dismiss dated December 26, 1973 was denied by the Review Board, FCC 74R–31 (1974).

[17] "Original action on interlocutory matters. In adjudicative proceedings conducted by Administrative Law Judges (including mixed adjudicative and rulemaking proceedings), the Review Board shall take original action on the following interlocutory matters and upon any question with respect to such matters which is certified to it by the presiding officer (see § 1.291 of this chapter):

(1) Petitions to amend, modify, enlarge, or delete issues upon which the hearing was ordered."

[18] FCC 74R–31 (1974).

[19] An exception is the Trial Staff's Motion to Dismiss, *supra*, note 16, which was denied. We note also that TRT's January 8 Opposition and Reply requested the Review Board, if it did not assert jurisdiction, to certify the pleadings to the Commission rather than dismissing them. This the Board granted *sub silentio*.

[20] "Except as otherwise provided in this chapter, pleadings in Commission proceedings shall be filed in accordance with the provisions of this section.

(a) *Oppositions.* Oppositions to any motion, petition, or request may be filed within 10 days after the original pleading is filed.

(b) *Replies.* The person who filed the original pleading may reply to oppositions within 5 days after the time for filing oppositions has expired. The reply shall be limited to matters raised in the oppositions, and the response to all such matters shall be set forth in a single pleading; separate replies to individual oppositions shall not be filed.

(c) *Additional pleadings.* Additional pleadings may be filed only if specifically requested or authorized by the Commission."

pany filed such an opposition the same day, the Petition to Strike is redundant, and the pleading unauthorized. As discussed above, we are granting the relief requested on our own motion. Second, the the Reply of WUI dated January 18, 1974 responds to two reply pleadings [21] and is thereby unauthorized. Since the matters raised therein are being acted upon in reference to other pleadings, we believe WUI will not be prejudiced by our failure to consider this pleading.[22]

12. As discussed above, we are dismissing the petitions asking us to reconsider the hearing issues which were before us prior to issuing our November Order. As a result, we need not discuss each issue or the objections raised in the responsive pleadings thereto.[23] We also need not reach the other procedural objections to several initial pleadings that appear in the responsive pleadings.

13. Finally, we have been concerned that the hearing procedure adopted in this case expedite a resolution of the division of tolls question. In ordering the hearing to go forward in two stages, we had hoped to avoid any unnecessary delay which would occur if the question of the absorption or pass through by the IRC's of all or part of any increased landline charges were litigated before a determination had been made that the landline charges were to be increased. We continue to believe this a prudent course, even though we recognize the possibility that a two-stage hearing may, ultimately, lead to greater delay than a unified procedure. However, we are persuaded that the presiding Administrative Law Judge should be given wider scope than has been previously granted him to make the determination whether to proceed in one stage or two. Accordingly, we will modify our previous Order to withdraw the prior inflexible two-stage requirement and in lieu thereof specify that the Judge should exercise his discretion, at an appropriate point in the proceeding, either to consider only the WU claim first, or to simultaneously take evidence upon the effect on the IRC's. We do not think it appropriate now to specify at what point in the proceeding such a determination should be made. We do retain, however, the requirement that no increased landline haul charges can be collected from the international carriers until the impact of such a requirement has been fully assessed.

14. Accordingly, IT IS ORDERED, that the procedure for conduct of the hearing in this matter, as specified in 44 F.C.C. 2d 1171 (1973), ARE MODIFIED to the extent provided herein.

15. IT IS FURTHER ORDERED, that the pleadings numbered 1, 3, 5, 6, 9, 10, 12, 14, 18 and 25 in the Appendix hereto ARE DISMISSED;

[21] Reply of Western Union dated December 26, and Statement of Trial Staff dated December 27, 1973, the latter of which in substance is a reply to two oppositions.

[22] WUI in its Reply dated February 28, 1974 contends that the Trial Staff's Opposition dated February 14, 1974 is untimely as it opposes pleadings filed in December before the Review Board and certified to the Commission on February 4. Since the principal argument which the Trial Staff raises, application of Section 1.106 of the Rules to certain pleadings, could only have been raised before the Commission, this pleading is timely and is granted with regard to this issue and dismissed with regard to other issues which could have been raised before the Review Board.

[23] Oppositions by TRT dated December 13, by Trial Staff dated December 28, and by WU dated December 27, 1973; and the Replies of WU dated December 26, 1973, of WUI dated January 18, and of TRT dated January 8, 1974.

16. IT IS FURTHER ORDERED, that the pleadings numbered 4, 8, 23 and 24 ARE DENIED to the extent provided herein and otherwise ARE DISMISSED;

17. IT IS FURTHER ORDERED, that the pleadings numbered 2, 7, 20 and 28 ARE DENIED;

18. IT IS FURTHER ORDERED, that the pleadings numbered 11, 16 and 17 ARE GRANTED;

19. IT IS FURTHER ORDERED, that the pleadings numbered 15, 19 and 26 ARE GRANTED to the extent provided herein and otherwise ARE DENIED; and

20. IT IS FURTHER ORDERED, that pleading numbered 22 IS DISMISSED except insofar as granted by the Review Board.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Pleadings Filed

	Date	Party	Title
1.	Nov. 30	WU	Motion to amend or delete issues.
2.	Dec. 5	ITT	Motion to change issues.
3.	Dec. 10	TS	Motion of trial staff to amend procedures and to oppose deletion of issues.
4.	Dec. 13	WUI	Opposition to motion to amend or delete issues.
5.	...do....	WUI	Petition to strike.
6.	...do....	ITT	Opposition to motion to amend or delete issues.
7.	...do....	RCA	Motion for change of issues.
8.	...do....	TRT	Opposition of TRT Telecommunications Corp. to the Western Union Telegraph Co.'s motion to amend or delete issues.
9.	...do....	TRT	Petition of TRT Telecommunications Corp. to enlarge issues.
10.	...do....	RCA	Opposition to motion to amend or delete issues.
11.	Dec. 14	WU	Western Union's opposition to ITT Worldcom's motion to change issues.
12.	...do....	WUI	Motion to amend issues.
13.	Dec. 26	TS	Motion of trial staff to dismiss TRT Telecommunications Corp., petition to enlarge issues and Western Union International, Inc., motion to amend issues.
14.	...do....	TRT	TRT Telecommunications Corp. opposition to motion of trial staff to amend procedures.
15.	...do....	WU	Reply of Western Union.
16.	Dec. 27	TS	Statement of trial staff concerning TRT Telecommunications Corp. opposition and Western Union International, Inc., petition to strike.
17.	...do....	TS	Motion of trial staff for extension of time.
18.	...do....	WU	Western Union's opposition to the motion of TRT and WUI to amend issues.
19.	Dec. 28	TS	Trial staff opposition to WUI motion to amend issues.
20.	Dec. 31	ITT	Reply of ITT World Communications Inc., to opposition of Western Union Telegraph Co.
21.	Jan. 8	WUI	Motion for an extension of time.
22.	...do....	TRT	TRT Telecommunications Corp. opposition to trial staff motion to strike; reply to trial staff and Western Union Telegraph Co.'s oppositions.
23.	Jan. 11	WUI	Opposition to motion of trial staff to dismiss motion to amend issues.
24.	Jan. 18	WUI	Reply of Western Union International, Inc.
25.	...do....	WUI	Reply of Western Union International, Inc. to oppositions to its motion to amend issues.
26.	Feb. 14	TS	Trial staff opposition to WUI motion to amend issues and TRT petition to enlarge issues.
27.	Feb. 27	WUI	Motion for an extension of time.
28.	Feb. 28	WUI	Reply to trial staff opposition to WUI motion to amend issues.

FCC 74-395

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of ITT WORLD COMMUNICATIONS, INC. Petition Under Section 201(a) of the Communications Act of 1934 for Connection With RCA Global Communications, Inc., to Enable ITTWC To Provide Telex and Message Telegraph Services with Guam	Docket No. 19684
ITT WORLD COMMUNICATIONS, INC. Application for Authority To Establish and Operate International Message Telegraph and Telex Services Between the U.S. Mainland and Guam by Connection With and Use of Facilities of RCA Global Communications, Inc.	File No. T-C-1791-10
WESTERN UNION INTERNATIONAL, INC. Application for Authorization Pursuant to Section 214 of the Communications Act of 1934, as Amended, To Establish and Operate International Message Telegraph and Telex Services Between the U.S. Mainland and Guam by Connection With and Use of Facilities of RCA Global Communications, Inc.	File No. I-T-C-2097-1

MEMORANDUM OPINION, ORDER, AND AUTHORIZATION

(Adopted April 16, 1974; Released May 3, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration the record in the proceedings in Docket No. 19684 and the above-captioned applications.

2. By Memorandum Opinion and Order released February 20, 1973 (39 FCC 2d 778), the Commission designated for hearing the above-captioned docket proceeding No. 19684, pursuant to Section 201(a) of the Communications Act, to determine whether it is necessary or desirable in the public interest to require RCA Global Communications, Inc. (RCAGC) to interconnect its telegraph message and telex facilities with facilities of ITT World Communications Inc. (ITTWC) and Western Union International, Inc. (WUI), for the provision of service to and from Guam; the points at which any such interconnec-

tion should be established; and, the financial and other effects such interconnection would have upon the interested carriers.[1]

3. Hearings in this proceding were held before Arthur A. Gladstone, Chief Administrative Law Judge, on July 30 and 31 and August 1, 8, 9, 10 and 16, 1973. The hearings were continued from time to time, pursuant to appropriate Orders, pending settlement discussions among the parties. On November 21, 1973, the parties jointly filed a Motion to Approve Settlement and Terminate Investigation, attaching thereto a proposed settlement. On November 23, 1973, the Administrative Law Judge issued an Order (FCC 73M–1335) pursuant to the request of ITTWC and concurred in by RCAGC and WUI, indefinitely postponing all procedural dates in the proceeding pending consideration of the terms of the proposed settlement.[2] The agreement is now ripe for Commission consideration and action.

4. In substance, the proposed settlement provides that RCAGC shall permit ITTWC and WUI to interconnect its telex lines with the telex switches of RCAGC either at New York City or Lodi, California at a one-time charge of $700.00 per interconnected 50-baud channel. Each carrier would share in the monthly cost of telex channels assigned by RCAGC to Mainland/Guam telex service in proportion to the relative amount of telex traffic handled by each during that month.[3] During the first 12-month period of operation under the proposed agreement, RCAGC would receive 65% of the telex revenues on traffic originated by or terminating in the facilities of ITTWC or WUI. In the next two 12-month periods the RCAGC share would drop to 60% and 55%, respectively, and would be maintained at 50% thereafter. Divisions would be made before outpayments to other carriers; calls originating on Guam would be transmitted by RCAGC to ITTWC or WUI only if specifically so routed by the sender. As regards telegram service, RCAGC will pay ITTWC/WUI $.085 per full-rate word, with transfers taking place in New York City. In the event outpayments to the Western Union Telegraph Company (WU) increase in the future, RCAGC will pay to ITTWC/WUI an amount equal to $.020 per full-rate word in excess of the established outpayment to WU. Message telegrams originating on Guam would be transferred to ITTWC or WUI only if specifically so routed by the sender. The sharing of transit telex and message telex tolls is based upon a schedule which varies according to country of origination or destination.[4]

5. It would appear that the proposed settlement addresses all of the issues heretofore designated for investigation in Docket No. 19684 and that implementation thereof should improve and expand communication services to and from Guam. Accordingly, we believe that

[1] Issues were clarified in subsequent Orders—41 FCC 2d 23; 42 FCC 2d 228 (1973).

[2] In this connection the trial staff of the Bureau held several conferences with the interested carriers which resulted in a more comprehensive and definitive understanding of the terms of the proposed interconnection agreement.

[3] The monthly cost per 50-baud channel from the West Coast to mid-point Guam has been computed at $214.00. The total cost to be shared is based on the number of circuits assigned to Guam. Total telex minutes handled by the three carriers with Guam from and to the Mainland would be used to derive an average cost per minute for the month, and each would multiply that average cost by the number of minutes it handled to obtain its share of the total monthly cost.

[4] The original settlement agreement filed November 21 was subsequently amplified. The complete terms of the proposed agreement which has been converted into an automatically renewable five-year operating agreement are contained in an exchange of correspondence among the parties, which is annexed (Attachments A through E) to the above-captioned applications.

approval of the settlement would serve the public interest and that continuation of the proceedings in Docket No. 19684 would serve no further useful purpose. Accordingly, we shall terminate this proceeding.

6. In the above-captioned file No. T–C–1791–10, ITTWC requests authority to (a) acquire and operate up to six 50-baud channels between its own and RCAGC's operating offices in New York, New York, which are to be connected on a demand basis with facilities and circuitry of RCAGC between New York, New York and Guam; (b) use on a demand basis such facilities and circuits of RCAGC between New York, New York and their theoretical midpoint between the Mainland and Guam; and (c) use the circuitry and facilities covered by (a) and (b) above for the joint rendition with RCAGC of message telegraph and telex services between points served in or via the U.S. Mainland and points in or served via Guam. ITTWC plans to initially implement one channel for message service and three channels for telex service, holding the remaining two for future use.

7. In File No. I–T–C–2097–1, WUI requests similar authority, except that it proposes to lease four 50-baud channels and to interconnect its operating office in New York, New York with RCAGC's office at Lodi, California.

8. Public notices of the applications of ITTWC and WUI were issued on January 14, 1974 and March 4, 1974, respectively, and copies of said applications together with notices extending opportunity to file comments were mailed to the parties specified by statutory requirement. No comments have been received.

9. On review of the record before us, it appears that a need exists for the acquisition of the circuits requested by each of the applicants and that the proposed provision of service is consistent with the settlement agreement reached by the parties in Docket No. 19684. As regards charges to the public for international message telegraph service to Guam, and for both message and telex service from Guam, the applicants propose that they shall be reflected in the respective ITTWC/WUI and RCAGC present and future tariffs covering such services. As regards telex service to Guam, the applicants propose to revise their respective tariffs to reflect those rates as now appear in the appropriate RCAGC tariff.

10. We, therefore, conclude that the public interest would best be served by approval of the settlement agreement, termination of the proceedings in Docket No. 19684 and grant of the above-captioned applications.

Accordingly, IT IS ORDERED, pursuant to Section 201(a) of the Communications Act of 1934, that RCA Global Communications, Inc. shall establish physical connections of its circuits and facilities with those of ITT World Communications Inc. and Western Union International, Inc. in accordance with the terms of the agreement among the parties as set forth in the exchange of correspondence annexed to the above-captioned applications (Attachments A through E) of ITT World Communications Inc. and Western Union International, Inc., respectively.

IT IS FURTHER ORDERED, That application File No. T–C–1791–10 of ITT World Communications Inc. IS GRANTED and ITT World Communications Inc. IS AUTHORIZED to

(A) acquire and operate up to six 50-baud channels between the ITT World Communications Inc. and RCA Global Communications, Inc. operating offices in New York, New York, which will connect on a demand basis with facilities and circuitry of RCA Global Communications, Inc. between New York, New York and Guam;

(B) use on a demand basis those facilities and circuitry of RCA Global Communications, Inc. between New York, New York and the theoretical midpoint of RCA Global Communications, Inc. overseas circuitry between the United States Mainland and Guam which will interconnect with the circuitry of (A) above; and

(C) use the circuitry and facilities covered by (A) and (B) above for rendering jointly with RCA Global Communications, Inc.'s Guam operating office international message telegraph and telex services between points in or served via the United States Mainland and points in or served via Guam.

IT IS FURTHER ORDERED, That application File No. I–T–C–2097–1 of Western Union International, Inc. IS GRANTED and Western Union International, Inc. IS AUTHORIZED to

(A) acquire and operate up to four 50-baud channels between the Western Union International, Inc. operating office in New York, New York, and the RCA Global Communications, Inc. operating office in Lodi, California, which will connect on a demand basis with facilities and circuitry of RCA Global Communications, Inc. between Lodi, California and Guam;

(B) use on a demand basis the RCA Global Communications, Inc. facilities between Lodi, California and the theoretical midpoint of RCA Global Communications, Inc.'s overseas circuitry between the United States Mainland and Guam, which will interconnect with the circuitry in (A) above; and

(C) use the circuitry and facilities covered by (A) and (B) above to provide jointly with RCA Global Communications, Inc.'s Guam operating office international message telegraph and telex services between points in or served via the United States Mainland and points in or served via Guam.

IT IS FURTHER ORDERED, That the proceedings in Docket No. 19684 BE, AND HEREBY ARE, TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74–473

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF KMAP, INC., LICENSEE OF RADIO STATION KWAC, BAKERSFIELD, CALIF.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted May 1, 1974; Released May 7, 1974)

BY THE COMMISSION: COMMISSIONER QUELLO NOT PARTICIPATING.

1. In *KMAP, Inc.*, 43 FCC 2d 258, 28 RR 2d 699 (1973), we ordered KMAP, Inc. (KWAC), licensee of Station KWAC, Bakersfield, California, to forfeit $2,500. KWAC sought mitigation or remission of the forfeiture and in *KMAP, Inc.*, 44 FCC 2d 971, 29 RR 367 (1974), the forfeiture was reduced to $2,000. Now under consideration is a petition filed by KWAC on February 20, 1974, seeking reconsideration of that action.

2. The basis for the forfeiture is set out in detail in the cases cited above. Briefly, we found that KWAC had failed to announce that its announcers were receiving payments for the dedication of programs, in violation of Section 317(b) of the Communications Act and Section 73.119(c) of our Rules, and that KWAC broadcast information concerning two lotteries, in violation of 18 U.S.C. 1304.

3. Information concerning one of the lotteries was contained in announcements promoting a "JBA" annual barbecue. KWAC states that no consideration flowed to the station for these announcements and, therefore, no lottery can be found, citing *Greater Indianapolis Broadcasting Co.*, 44 FCC 2d 37, 28 RR 2d 1435 (1973). However, that case held, assuming the presence of the elements of chance and a prize, that the consideration necessary to establish a lottery must flow to the lottery *promoter*. The promoter of the "JBA" lottery, which was not the station, did receive the necessary consideration. Thus, KWAC is not relieved of liability because of our decision in the *Greater Indianapolis* case.

4. KWAC also cites that Third Circuit's recent decision in *New Jersey State Lottery Commission* v. *FCC*, Case No. 72–1878, issued January 2, 1974. KWAC characterizes that case as ruling ". . . that 'news stories', for which no consideration is received by a broadcast station, are not proscribed by 18 U.S.C. Sec. 1304." We have sought Supreme Court review of that case, and KWAC suggests that action on the present forfeiture should be withheld until after the Supreme Court acts. We note, however, that KWAC apparently does not consider the announcements in question here to be "news stories" since it consistently refers to the announcements as "public service an-

nouncements" or "public service spots," that were broadcast without change on thirteen successive days to promote a fund-raising event. Moreover, the Court stated in the *New Jersey* case:

> Possibly * * * some uncompensated promotional announcements outside the context of broadcast journalism might be found by the FCC to be promotional, and not news, and hence prohibited by 18 U.S.C. § 1304. *We need not decide that issue in this case.* (Slip Op., pages 11–12, emphasis supplied.)

Thus, the Court expressly refused to rule on the applicability of 18 U.S.C. 1304 to the kind of announcements presented here, which we believe fall within the prohibition set out in the statute. There is, therefore, no reason to withhold action on his matter until after the Supreme Court acts on the *New Jersey* case.

5. KWAC repeats its argument that it is unfair to fine it for broadcasting lottery announcements because other stations in the area have broadcast similar lottery announcements. Although requested to do so by our staff, KWAC refuses to identify the stations it believes to have violated 18 U.S.C. 1304. Unfortunately, we have limited resources so that we are unable to find all violators of 18 U.S.C. 1304 .While our limited resources may result in some violators going unpunished, that does not mean that we cannot impose sanctions against those violators we do find.[1]

6. The other matters raised in KWAC's pleading have been considered and rejected in our previous decisions in this matter.

7. Accordingly, IT IS ORDERED, That the petition for reconsideration filed February 20, 1974, by KMAP, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[1] In calendar year 1972, two stations were sent Notices of Apparent Liability based in part on violations of 18 U.S.C. 1304. In 1973, ten stations received such notices of apparent liability. In addition, four applications for renewal of license were designated for hearing in 1973 that included issues concerning alleged violations of 18 U.S.C. 1304.

FCC 74-441

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of LEFLORE BROADCASTING CO., INC. (WSWG-AM), GREENWOOD, MISS. DIXIE BROADCASTING CO., INC. (WSWG-FM), GREENWOOD, MISS. For Renewal of License	Docket No. 20025 File No. BR-4354 Docket No. 20026 File No. BRH-1709

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released May 2, 1974)

BY THE COMMISSION:

1. Now under consideration are: the captioned applications; a petition to deny the application of Leflore Broadcasting Company, Inc. (Leflore), filed January 10, 1973, by the Greenwood Communications Committee, an unincorporated association of persons in Greenwood, and by James Moore, Jake McGhee and Martha Cooley, individually and as members of the Committee; an opposition filed March 14, 1973 by Leflore; a reply filed April 10, 1973, by the petitioners; our field investigation into the operation of Station WSWG(AM); the matters left unresolved in our decision in *Leflore Broadcasting Company, Inc.*, 36 FCC 2d 101, 24 RR 2d 953 (1972); a petition to deny the application of Dixie Broadcasting Co., Inc. (Dixie), filed May 1, 1973, by the Greenwood Communications Committee and by James Moore, Jake McGhee and Martha Cooley, individually and as members of the Committee; an opposition filed June 4, 1973, by Dixie; and related pleadings.[1]

2. We find that the petitioners, as a group of concerned listeners residing in the Greenwood area, are parties in interest within the meaning of Section 309(d) of the Communications Act, *Office of Communication of the United Church of Christ* v. *FCC*, 359 F. 2d 994, 7 RR 2d 2001 (D.C. Cir. 1966).

3. In regard to the AM application, Leflore contends that some of the petitioners' allegations are not "supported by affidavit of a person or persons with personal knowledge" of the facts as required by Section 309(d) of the Act. In *Leflore Broadcasting Company, Inc.*, 37 FCC 2d 655 (1972), we considered a motion filed by the petitioners for clarification or reconsideration of our first decision in this matter. We there stated:

> * * * in the ordering clauses of the first decision, we did not dispose of all matters raised in (the petitioners') pleadings. Specifically, we left open three questions that were raised by the various pleadings. The petitioners need not plead their case a second time as to those questions. (37 FCC 2d at 655)

[1] The related pleadings are motions for extensions of time to file opposition and reply pleadings, which are hereby granted.

We recognize that the list of petitioners filing the prior pleadings is not identical with the present list. Nonetheless, since some individuals appear in both lists, we believe that the present petitioners can lay claim to the material and documents included in the prior pleadings, since the same issues are raised. The prior pleadings are supported by appropriate affidavits as to matters that we can not officially notice. We conclude, therefore, that the present pleadings meet the requirements of Section 309(d) of the Act.

4. The background of this proceeding, insofar as it pertains to the AM station, is set out more fully in our first decision, (see 36 FCC 2d 101). Briefly stated, however, Leflore, in preparing its 1970 renewal application, conducted a survey and found a need for entertainment and non-entertainment programming directed toward the area's black community.[2] Leflore proposed to meet those needs in its application, which was granted July 14, 1970. The entertainment format was to be rhythm-and-blues music, which was selected in light of an audience preference survey. On March 8, 1971, Leflore changed its entertainment format to country-and-western music [3] and fired three black announcers. These actions resulted in the filing of the pleadings we considered in our prior decisions in this matter. Based on those pleadings, and on the findings of our own field investigation, we called for the early filing of Leflore's renewal application, and stated that based on the information then before us, we had the following questions concerning Leflore's operation of Station WSWG:

> (a) Whether the licensee has carried out in good faith the representations made in its 1970 renewal application as to proposed non-entertainment programming, particularly with respect to the programming directed toward meeting the problems and needs of the Black community;
>
> (b) Whether in light of the licensee's performance in carrying out its representations in its renewal application and subsequent written statements to the Commission, the licensee made misrepresentations to the Commission in its 1970 renewal application or those statements; and
>
> (c) Whether the licensee has violated Section 73.125 of our Rules.

See 36 FCC 2d at 104. After reviewing all the pleadings and the renewal application, we believe that these questions still remain and that a hearing is required.

5. Financial hardship is the only basis that Leflore has set forth as a reason for the entertainment format change. Based on the information then before us, we stated in our first decision that we would not make inquiry as to the change in format in light of Leflore's apparently poor financial position, 36 FCC 2d at 103. We did, however, make available to the petitioners the Annual Financial Reports (FCC Form 324) for WSWG so that they could file any comments they thought appropriate as to WSWG's financial position. Moreover, because Stations WSWG(AM) and WSWG–FM shared the same facilities and employees, and because the two stations were identically owned and controlled, although licensed to separate corporations, the Form 324's for

[2] The non-white community constitutes 50.4 per cent of the population of Greenwood and 58.3 per cent of the population of Leflore County, where Greenwood is located.

[3] The country-and-western format was subsequently dropped on May 3, 1971, when WSWG and WSWG–FM began simulcasting the middle-of-the-road format that WSWG–FM previously had been broadcasting. Leflore has provided no information indicating that these changes in format were preceded by a survey indicating that these had now become the preferred formats, in place of the preference for rhythm-and-blues music that had been found in its prior survey.

Station WSWG–FM were also made available to the petitioners. The petitioners now raise a question as to a misallocation of costs between the AM and FM operations that may have distorted the losses of WSWG(AM) when using the rhythm-and-blues format. In opposition, Leflore has submitted a letter from its certified public accountants to establish that the AM station sustained losses and that costs were reasonably allocated between the licensee of the two stations. However, the letter is neither addressed to the Commission nor in affidavit form. There is also an inconsistency between this letter and a prior letter provided by the same accountants, which raises questions as to the reliability of the information provided in the letters. Earlier, the accountants stated that the salary of Vice-President and General Manager James McCullough was paid entirely by the FM station. In the present letter, it is stated, in reference to the same time period, that the General Manager's salary was shared by the AM and FM operations. The percentage paid by each station is not indicated. The petitioners also raise questions as to the payments made to McCullough and C. D. Saunders. Saunders is President and 75 percent owner of both licensees. For example, Leflore and Dixie claimed greater combined losses ($73,777) in 1971, the year the AM station's format was changed, than in any previous year. Yet 1971 was the first year since the acquisition of WSWG(AM) that payments were made to Saunders. McCullough's salary has also been increasing substantially during years when the combined operations were losing money. His salary in 1971 was more than $7,000 higher than his salary in 1969. That increase, the payments to Saunders and the discrepancies in the accountant's statements raise a question as to whether the losses claimed are as great as indicated by Leflore. Because the losses are the only basis put forward by Leflore for changing from a format apparently preferred by a substantial portion of the area's residents, and because the change in format resulted in a substantial reduction in the availability of the preferred format, we believe that Leflore's representations that the change in format was financially necessary should be explored in hearing.

6. Leflore represented in its 1970 renewal application that 5.1 percent of a typical broadcast week would be public affairs programming. Only 0.9 percent (43 minutes) of the composite week, according to Leflore, was in fact public affairs programming. Moreover, its logs show only a 5-minute program on June 21, 1971, as being logged as public affairs. Although not so stated in its logs, Leflore elsewhere indicates in its application, that it considers a program entitled "Self Expression Time" to be public affairs programming. Nonetheless, even if that program is included in the total amount of time during the composite week, we are able to find only a total of about 17 minutes of programming classified by the licensee as public affairs. Pursuant to Question 3(B), Section IV–A of the application form, Leflore has also submitted an analysis of its logs, but not the logs themselves, for the month of March, 1972, which it believes to be more representative than the composite week. During that month, Leflore states that 2.62 percent of its programming fell in the public affairs category which is still substantially below the amount represented in the 1970 application. In this respect, we note that in a list of programs broadcast dur-

ing the last license term that the licensee believes served the needs and interests of the area, Leflore has classified several programs as public affairs which do not appear to fall in that category.[4] Specifically programs entitled "Winter Carnival Day," "Greenwood Week," and "Miss Hospitality Pageant," based on the descriptions given, apparently should have been classified as "other" programming, not as public affairs. Thus, on the basis of information submitted, we have no assurance that Leflore broadcast even the 2.62 percent public affairs programming during March, 1972 as indicated in its analysis. Accordingly, a question is raised concerning Leflore's representations in its 1970 renewal application and its efforts to implement those representations.

7. The petitioners have requested that additional program logs be made available to the petitioners so that they may analyze them, and that they be afforded additional time to supplement their petition upon the completion of that analysis. However, such logs are subject to appropriate motions for discovery prior to hearing, and we believe such motions are more appropriate than further delaying the institution of this proceeding.

8. The materials in the pending renewal application and in the various pleadings have not resolved the questions we have about the operation of WSWG(AM), see paragraph 4, above. In view of these questions, we are unable to find that a grant of the renewal application would serve the public interest, convenience and necessity, and must, therefore, designate the application for hearing.

9. WSWG–FM is licensed to Dixie Broadcasting Co., Inc. whose ownership and control is identical to that of Leflore Broadcasting Company, Inc., licensee of WSWG(AM). The renewal applications for both stations indicate that during the last renewal period the two stations have been operated jointly and their programming is presently being simulcast during the hours of AM operation. The renewal applications and the various pleadings relating to the licensees' employment practices further indicate that the licensees consider the staffs of both stations to be a combined one. Therefore, any conclusions with respect to the employment discrimination and misrepresentation issues raised above will be equally applicable to Dixie. In addition, the Greenwood Communications Committee, *et al.*, filed a petition to deny the renewal of WSWG–FM alleging that the licensee had failed to seek out representative black leaders in its ascertainment efforts, had failed to propose programming to meet the needs and interests of its service area and had discriminated in its employment practices. As previously noted, the applicant's compliance with Section 73.125 of the Commission's Rules is already in issue, and the allegations of employment discrimination with regard to the FM station therefore require no further discussion.

10. In its opposition filed June 4, 1973, Dixie asserts that the Petition to Deny was filed without benefit of a supporting affidavit and should therefore be summarily dismissed. Dixie further contends that

[4] Form 303, used for renewal applications, defines "Public Affairs" as including talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, round tables and similar programs primarily concerning local, national and international public affairs.

the petitioners have failed to allege sufficient facts to support the allegations of the Petition to Deny and that there is no factual basis to those allegations. The Petition to Deny indicates that an affidavit of verification would be forthcoming, but it does not appear that the necessary affidavit was ever filed. The Petition to Deny must therefore be dismissed pursuant to Section 1.580(i) of the Commission's Rules. However, the Petition to Deny raises serious public interest questions of the most basic nature, and, to the extent that these allegations rest on matters that can be officially noticed by the Commission, they will be discussed herein.

11. With regard to ascertainment, the petitioners allege that in spite of the fact that the population of Leflore County is approximately 67 percent black [5] Dixie interviewed 35 black and 38 white community leaders, and the general public interviews consisted of 368 white and 278 black contacts with an additional 234 contacts unidentified as to race. Petitioners further assert that the station ignored certain local black leaders which, petitioner implies, would have given Dixie a different picture of the problems, needs, and interests of the area. However, petitioners have failed to plead specific facts to indicate which black leaders of significant groups within the community should have been contacted and what additional problems would thereby have been ascertained. Further, the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 36 F.R. 4029 (1971) does not require applicants to contact community leaders or members of the general public in exact proportions to the various minority groups within an area. As previously indicated, non-whites constitute 50.4 per cent of the population of Greenwood and 58.3 per cent of the population of Leflore County. It therefore does not appear that Dixie has been unreasonable in the number of interviews conducted of black community leaders and members of the general public.

12. Petitioners allege that Dixie's program proposal fails to serve adequately the needs and interests uncovered in the licensee's survey. Exhibit 5 of Dixie's renewal application purports to set forth the programs proposed to meet the needs ascertained. Eight programs are listed, but three of these programs (Editorials, City and Area Promotions, and How's Your Health) are proposed at "varied times" without specific frequency, time or duration. Another program, Mississippi Valley State College, is proposed "monthly" without a scheduled time or duration, and the description of that program does not reveal its form, format, or how or what community problems would be dealt with in the program. Further, Dixie's Black History program is scheduled daily for 90 seconds, but Dixie has failed to indicate the time of day of that broadcast. The remaining three programs, (Self Expression Time, Goodwill Bulletin Board, and Issues and Answers) are proposed with the requisite frequency, time, and duration, but the weekly duration of these programs differs markedly from the applicant's program proposal as set forth in other parts of its renewal application. Exhibit 8 to Dixie's renewal application indicates that these programs are considered public affairs [6] and in response to paragraph

[5] The petition does not disclose the source of this 67% figure. See footnote three, above.
[6] Questions as to the proper classification of public affairs programs were raised in paragraph 6, above.

14 of Section IV–B, Dixie indicates that it proposes 3 hours 8 minutes of public affairs programs during the typical week. However, these three programs, for which specific frequency, time, and duration are given, add up to at least 5 hours 54 minutes of "public affairs" programs per week.[7] This discrepancy raises a question as to whether Dixie intends to broadcast these programs as proposed.[8] We further note that two of the three specifically proposed programs (Self Expression Time and Goodwill Bulletin Board) are 90 seconds or less in duration. Based on Dixie's descriptions of these programs, however, it is difficult to determine whether they are public affairs programs designed to serve ascertained community problems. We, therefore, find that Dixie's program proposal raises a substantial question as to exactly what the licensee proposes to broadcast and whether the programs proposed are adequately designed to meet those ascertained needs and interests with which the licensee intends to deal; and, thus, an appropriate issue will be added. Since WSWG(AM) and FM now simulcast, this question is equally applicable to the proposed programming of WSWG(AM).

13. Accordingly, IT IS ORDERED, That pursuant to Section 309 (e) of the Communications Act of 1934, as amended, the captioned applications ARE DESIGNATED FOR HEARING in a consolidated proceeding, at a time and place to be specified in a subsequent order, upon the following issues:

(1) To determine whether Leflore Broadcasting Company, Inc., has carried out in good faith the representations made in its 1970 renewal application as to proposed non-entertainment programming;

(2) To determine in light of the evidence adduced under the preceding issue, whether the applicant made misrepresentations to the Commission or was lacking in candor;

(3) To determine whether the applicants or their principals made misrepresentations to the Commission or were lacking in candor in other written submissions to the Commission;

(4) To determine whether the applicants violated Section 73.125 or Section 73.301 of the Commission's Rules;

(5) To determine whether the change in entertainment format on WSWG(AM) was, as claimed by the licensee, financially necessary;

(6) To determine the extent and nature of the applicants' proposed non-entertainment programming and whether that proposal adequately serves the ascertained problems, needs and interests of the community, as evaluated;

(7) To determine, in light of the evidence adduced under the preceding issues, whether the applicants have the requisite qualifications to be or to remain Commission licensees, and whether a grant of the applications would serve the public interest, convenience and necessity.

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[7] The total of 5 hours 54 minutes is based on 60 seconds for Self-Expression Time and Goodwill Bulletin Board, each broadcast every hour during a 162 hour week. No commercial time was deducted from these programs due to their short duration. Commercial time at the rate of 20 minutes per hour was deducted from Issues and Answers.

[8] An even larger discrepancy results when other less specifically proposed programs, also classified as public affairs by the licensee, are considered.

14. IT IS FURTHER ORDERED, That Johnny W. Williams, Theodore Hill, Jr., George Davis, W. S. Lee, Jr., Martha Cooley, Jake McGhee, James Moore, the Greenwood Movement and the Greenwood Communications Committee ARE MADE PARTIES RESPONDENT to this proceeding.

15. IT IS FURTHER ORDERED, That the Chief of the Broadcast Bureau shall serve upon the captioned applicants, within thirty (30) days of the release of this document, a Bill of Particulars with respect to issues (1) through (4), inclusive, as to allegations of fact and information in his possession not alleged by the petitioners.

16. IT IS FURTHER ORDERED, That the parties respondent proceed with the initial presentation of evidence with respect to issues (1) through (6), inclusive, that the Chief of the Broadcast Bureau present the evidence described in the Bill of Particulars with respect to issues (1) through (4), inclusive, and that the applicants then proceed with their evidence and have the burden of establishing that they possess the requisite qualifications to be and to remain licensees of the Commission and that a grant of the applications would serve the public interest, convenience and necessity.

17. IT IS FURTHER ORDERED, That the applicants and the parties respondent shall file a written appearance stating an intention to appear and present evidence on the specified issues, within the time and in the manner required by Section 1.221(c) of the Commission's Rules.

18. IT IS FURTHER ORDERED, That the applicants shall give notice of the hearing within the time and in the manner specified in Section 1.594 of the Rules, and shall seasonable file the statement required by Section 1.594(g).

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-452

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request of
McCLATCHY NEWSPAPERS
Concerning a Temporary Waiver of Section 76.501(a)(2)

APRIL 18, 1974.

CHARLES K. McCLATCHY,
Vice President, McClatchy Newspapers,
225 East Miner Avenue,
Stockton, Calif. 95202

DEAR SIR: This is in response to your letter filed September 17, 1973, requesting a temporary waiver of Section 76.501(a)(2) of the Commission's Rules to permit McClatchy Newspapers to increase its ownership interest in Nor Cal Cablevision, Inc., from forty percent to sixty percent, by acquisition of Com-West, Inc.'s twenty percent interest in Nor Cal.

In support of your request, you state the following: Nor Cal presently operates cable television systems in California at Oroville, Butte County, Colusa, Colusa County, Yuba City, Sutter County, Marysville, Yuba County, and at Yuba County—Beale Air Force Base. Each of these systems began operating prior to July 1, 1970, except Beale Air Force Base. At present, three different companies have ownership interests in Nor Cal. Viacom International, Inc., owns forty percent; McClatchy Newspapers owns forty percent; and Com-West, Inc., owns twenty percent, which it wishes to sell to McClatchy. McClatchy also is licensee of Television Broadcast Station KOVR, Stockton, California, however, which places a predicted Grade B contour over Yuba City, Colusa, Marysville, Sutter County, Colusa County, and Yuba County.

Although McClatchy now has filed a petition for permanent waiver of Section 76.501 of the Commission's Rules (CSR-473(x)), the merits of which we do not reach here, absent waiver Section 76.501 requires divestiture by August 10, 1975, of McClatchy's interest in Nor Cal. Section 76.501(b) also prohibits an increase of ownership interest in an existing cable television system where the party seeking the increase must divest its interests in either a cable system or a television station by August 10, 1975. *Gill Industries*, FCC 71-1275, 33 FCC 2d 818. Grant of the instant request will allow McClatchy to hold a sixty percent interest in Nor Cal only until August 10, 1975. McClatchy stresses this fact and cites three prior instances in which the Commission has authorized such temporary waivers. *Gill Industries, supra, Kern Cable Co., Inc.*, FCC 71-1276, 33 FCC 2d 823, and *Stauffer Publications Inc.*, 25 RR 2d 111 (1972).

Viacom opposes McClatchy's requested waiver, arguing that the cases above were all decided prior to January 17, 1973, when the Commission adopted the *Memorandum Opinion and Order in Docket No. 18397*, FCC 73–80, 39 FCC 2d 377, denying reconsideration of the cross-ownership provisions. Viacom also states that it too wants to acquire the controlling interest in Nor Cal from Com-West; that it has no cross-ownership interests in the area; and that it has more experience than McClatchy in operating cable television systems. Viacom admits that its negotiations with Com-West have been unsuccessful to date. It urges, however, that the Commission consider its objections, require filing of the agreement between McClatchy and Com-West, and deny both of McClatchy's requests for waiver (temporary and permanent)—preferably together.

On the other hand, Com-West fully supports McClatchy's request for a temporary waiver. Com-West asserts that it would be fruitless to attempt to sell its twenty percent share on the open market; that McClatchy has made a fair and equitable offer, although Viacom has not; and that should the Commission disqualify McClatchy as a buyer, it would be forced either to retain its stock, contrary to its best interests and desires, or to sell to Viacom on its terms.

Considering the limited duration of the requested waiver, we are persuaded that the balance of equities in this instance favors grant of McClatchy's request. In fact, we have previously granted temporary waivers of Section 76.501 in other situations where it has been shown that there was a legitimate business purpose, and where the waiver's duration would not extend beyond the divestiture date of Section 76.501 (August 10, 1975). See, e.g., *Gill*, *supra*, *Kern*, *supra*, *Stauffer*, *supra*. When we released our *Memorandum Opinion and Order* reconsidering the cross-ownership restrictions in Docket No. 18397, F.C.C. 73–80, 39 F.C.C. 2d 377, 394, on January 31, 1973, we invited the filing of petitions for waiver (within the next 120 days) from all parties who *then* were "* * * cross-owners of co-located television stations and cable systems who believe that grandfathering would be appropriate in their case." Of course, we did not intend that this invitation be extended to include any cross-ownership interests which the parties had not acquired prior to that date. Therefore, the waiver which we are granting herein is of a strictly temporary nature (until August 10, 1975), and the twenty percent interest that it will enable McClatchy to acquire in Nor Cal will not be considered as having even potentially grandfathered status. According, to the extent indicated above, Section 76.501 IS WAIVED.

By Direction of the Commission,
Vincent J. Mullins, *Secretary.*

FCC 74D-15

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of MIRACLE VALLEY BROADCASTING CO., INC. (WEIF), MOUNDSVILLE, W. Va. For Construction Permit	Docket No. 19794 File No. BP-18338

APPEARANCES

William P. Bernton, E. Theodore Mallyck and *Jeffrey Malickson* on behalf of Miracle Valley Broadcasting Company, Inc., *Mark S. Fowler, Smith and Pepper* on behalf of Camptown Industries, Inc.; and *Robert W. Ross* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE REUBEN LOZNER

(Issued February 26, 1974; Effective April 24, 1974 pursuant to Section 1.276 of the Commission's Rules)

PRELIMINARY STATEMENT

1. By Memorandum Opinion and Order released August 1, 1973 (FCC 73-798), 42 FCC 2d 341, the Commission designated for hearing the above-captioned application of Miracle Valley Broadcasting Company, Inc., (WEIF) for a construction permit to increase daytime power. The applicant is licensee of standard broadcast station WEIF licensed to Moundsville, West Virginia, operating days only at 1 kW on 1370 kHz. The applicant in its application initially filed on July 18, 1968, and resubmitted on November 18, 1968, seeks a construction permit to increase its daytime power to 5 kW. The issues designated for hearing are as follows:

1. To determine whether Fred Grewe, Jr., has sufficient net current liquid assets to finance the proposed construction and, in light thereof, whether Miracle Valley Broadcasting Company, Inc., is financially qualified.

2. To determine whether Miracle Valley Broadcasting Company, Inc., employed a deceptive coverage map on the WEIF rate card, and, if so, whether it continues to possess the requisite qualifications to be a broadcast licensee.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

2. In the said order the Commission recited that it had before it for consideration, (i) the application; (ii) the petition to deny by WK, Inc., (WKWK) former licensee of standard broadcast station WKWK, Wheeling, West Virginia, which petition was adopted by

WK Inc.'s succsessor in interest, Publishers Broadcasting Corporation; and (iii) pleadings in opposition and reply thereto. On January 31, 1973, following an application filed by Publishers Broadcasting Corporation on January 10, 1973, the authority contained in Authorization File Nos. BR–117 and BS–117 to use and operate main and auxiliary transmitters, and call letters, WKWK, was modified to change the corporate name of the licensee to Camptown Industries, Inc. Simultaneously the same modification consisting of a change of corporate name was made with respect to licenses held by Publishers Broadcasting Corp. for WBGM–FM and WONS, Tallahassee, Florida.

3. On September 17, 1973, WEIF filed a petition for leave to amend its application by the submission of (1) a loan commitment dated September 10, 1973, in the amount of $30,000 from Fred A. Grewe, Jr., and (2) a financial statement of Fred A. Grewe, Jr., as of July 31, 1973. By order released September 27, 1973, the Presiding Judge granted the petition (73M–1121).

4. Following the issuance of the Commission's order herein counsel for WKWK on August 17, 1973, filed a Notice of Appearance pursuant to section 1.221 of the Commission's rules, in the usual form stating, ". . . it will appear on the date fixed for the hearing in the above-captioned proceeding and present evidence on the issues specified in the order of designation."

5. At the prehearing conference convened in Washington, D.C. on September 5, 1973, counsel for WEIF, WKWK and for the Broadcast Bureau appeared and participated. Counsel for WKWK indicated that he did not intend to present any direct case at the hearing and any evidence which might be submitted by WKWK would be by way of rebuttal.

6. Following the prehearing conference, on September 6, 1973, the Presiding Judge released an order scheduling the dates for the exchange of exhibits and the identification lists of witnesses (FCC 73M–1015). Upon the filing of a petition for extension of time by WEIF the dates previously set were extended by the Presiding Judge in an order released on September 20, 1973, (FCC 73–1080). Exhibits were to be exchanged no later than October 17, 1973. In accordance with the revised schedule WEIF and the Broadcast Bureau exchanged proposed exhibits. No exhibits were proposed by WKWK.

7. Following the hearing which was convened and concluded on October 31, 1973, in Washington, D.C., the record was closed. Subsequently, on the petition of WEIF the record was reopened by order of the Presiding Judge released January 11, 1974 (FCC 74M–51), for the limited purpose of introducing certain affidavits in evidence. On January 22, 1974, a hearing conference was convened and several exhibits were offered by WEIF and were received in evidence.

8. At the hearing on October 31, 1973, counsel for WEIF, WKWK and the Broadcast Bureau appeared. At the opening of the hearing WKWK's counsel made a statement confirming a telephone communication to the Presiding Judge the preceding day to the effect that in accordance with the advice received from his client and after a detailed analysis of the posture of the case, WKWK and its counsel would not participate any further in the proceeding. According to

counsel he and his client had concluded that based on their analysis of the exhibits and other material related to the issues in the proceeding, his client could not contribute anything to the proceeding. Following an extensive colloquy on the record engaged in by counsel for WEIF, WKWK and the Broadcast Bureau, as well as the Presiding Judge, counsel for WKWK remained in the hearing room for a short period but did not participate in the hearing in any manner. Following the morning recess in the hearing, counsel for WKWK left the hearing and did not return. By letter to the Presiding Judge dated November 6, 1973, counsel for WKWK confirmed the statement made on the record that further participation by WKWK in the proceeding would serve no useful purpose and would only serve to delay the hearing.

9. By order released on January 30, 1974, following the receipt in evidence of a late filed exhibit, the record was again closed (FCC 74M–113). Proposed findings of fact and conclusions of law were submitted by WEIF and by the Broadcast Bureau on January 28, 1974.

10. The Presiding Judge has determined that certain material contained in the Commission's public files is relevant to the designated issues and it would be appropriate to take official notice of such material. Accordingly, the Presiding Judge takes official notice of documents in the Commission's public files, in File Nos. (i) BP–8395 (application to change frequency from 1470 kHz to 1370 kHz in 1952, including the engineering statement of Lynne C. Smeby and map prepared by him), (ii) BAL–2278 (assignment of license to current licensee in 1956), (iii) BTC–4536 (transfer of 100% control of licensee to Fred A. Grewe, Jr., in 1964), and (iv) BP–18338, Docket No. 19794 (the original application dated July 18, 1968, filed by the licensee), as requested by the Broadcast Bureau; and (v) in File No. BTC–6998 (transfer of control from Grewe to Grewe Radio, Inc., in 1972), as requested by the applicant.

FINDINGS OF FACT

Financial Issue (Issue 1)

11. In determining to include a financial issue, the Commission in its order found that the licensee would require $20,673 to effect the necessary change in its operation. The Commission stated that the licensee was relying on a $30,000 loan from its principal stockholder, Fred A. Grewe, Jr. However, since Grewe's financial statement failed to segregate current liabilities from his long-term obligations as required by the instructions to section III of FCC Form 301, it was determined to include a financial issue and to afford Grewe the opportunity to file a more detailed financial statement.

12. The applicant Miracle Valley Broadcasting Company, Inc., is the holder of the license for standard broadcast station WEIF, and is a wholly-owned subsidiary of Grewe Radio, Inc. By a loan commitment dated September 10, 1973 (confirming previous commitments) Fred A. Grewe, Jr., president, director and a 70% stockholder of Grewe Radio, Inc., agreed to lend the licensee $30,000, repayable

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over a six-year period. The proceeds of the loan were intended to cover the costs of effectuating the subject proposal determined to be $20,673.

13. The financial statement of Fred A. Grewe, Jr., as of July 31, 1973 (filed and accepted as an amendment) indicates that Grewe has total current liquid assets of $59,100. Grewe's current liquid assets consist of: (1) certificates of deposit totalling $41,100 in four banks; (2) the cash value of life insurance on Grewe's life amounting to $11,000 against which there are no outstanding loans; and (3) $7,000 in a personal checking account. The statement also indicates that Grewe's other assets consist of real and personal property and stock totalling in value, $1,673,900. With respect to Grewe's liabilities, his financial statement indicates that as of July 31, 1973, his current liabilities totalled $13,800. These current liabilities are stated separately in accordance with the instructions to section III of FCC Form 301. The current liabilities consist of mortgage principal payments due and payable within one year on long-term loans made by Grewe. The total current liabilities indicated on the financial statement amount to $13,800 but do not include the interest due and payable within one year on the principal payments listed as current liabilities. Such interest amounts due and payable on Grewe's outstanding long-term loans should be included in current liabilities and the amount of such interest obligations totals $4,812 annually. Adding this amount to the $13,800 stated as current liabilities increases the total current liability figure to $18,612. Grewe's separately stated long-term liabilities as of July 31, 1973, amounted to $48,000. Based on total assets and liabilities, Grewe's net worth on that date appears to be $1,671,200.

14. With respect to Grewe's current assets and liabilities, Grewe's total current liquid assets amount to $59,100, and his current liabilities amount to $18,612. Thus his net current liquid assets amounted to $40,488 as of July 31, 1973. Accordingly, it appears that Grew's net current liquid assets are adequate to provide funds to meet his loan commitment which is to finance the proposed construction by the licensee.

Deceptive Coverage Map Issue (Issue 2)

15. On February 8, 1952, an application was submitted on behalf of the licensee of WEIF (then operating with the call letters WMOD) seeking a change in frequency from 1470 kHz to 1370 kHz. Included in the application was an engineering statement of Lynne C. Smeby, a consulting radio engineer in Washington, D.C., containing *inter alia* a map portraying the 0.5 mV/m contour of the station for the proposed 1370 kHz operation, as well as 2, 5 and 25 mV/m contours. The application for the change in frequency was granted on November 19, 1952 (File No. BP-8395). According to the engineering statement, the Standards of Good Engineering Practice of the Commission were used in calculating the 0.5 mV/m contour.

16. A 1953 rate card used by the licensee of WEIF (then WMOD) purports to incorporate the 1952 Smeby map and the 0.5 mV/m contour depicted thereon. A legend to this effect appears on the rate card.

17. A subsequent station rate card, dated January 1, 1957, which was used by the then owner of station WEIF (then WMOD) roughly depicted the 0.5 mV/m contour on the 1952 Smeby map, although the source is not stated.

18. On April 4, 1956, the license of standard broadcast station WEIF, (then WMOD) was assigned to the applicant Miracle Valley Broadcasting Company, Incorporated. On June 4, 1964, Fred A. Grewe, Jr., purchased all of the stock of the licensee corporation and thereafter operated the station. Grewe's stock interest in the licensee was transferred to Grewe Radio, Inc., on November 28, 1972 (File No. BTC–6998). Grewe Radio, Inc., is a holding company which now owns all the stock of the applicant licensee, and has additional interests in broadcast stations WXLW, Indianapolis, Indiana; WGOE, Richmond, Virginia; WQTW, Latrobe, Pennsylvania; WSTL, Eminence, Kentucky; and WPAR, Parkersburg, West Virginia. Grewe is president, director, and 70% shareholder in Grewe Radio, Inc.

19. Following his take over of the station in 1964, Grewe operated without a rate card for several months. According to Grewe he did not intend to sell time at the 1957 rates since he realized that the market data had changed since the 1957 rate card was published and in addition the station's call letters had been changed from WMOD to WEIF, under which call letters it was continuing to operate. Therefore Grewe designed a new rate card which showed the station's new rates, and, also, included a depiction of the WEIF 0.5 mV/m contour which was hand-drawn by Grewe and was roughly based on the contour shown on the 1957 rate card.

20. The area included within the 0.5 mV/m contour represented on the coverage map on the 1957 rate card was somewhat, although not significantly, greater than that included within the original 0.5 mV/m contour on the 1952 Smeby map. The area included within the 0.5 mV/m contour in the 1964 rate card and coverage map is somewhat, but not significantly, less than that included within the original 0.5 mV/m contour. The 0.5 mV/m contours employed on the 1952 Smeby map as well as on the 1957 and 1964 rate cards were roughly circular in configuration centering on Moundsville, West Virginia. The areas included within the 0.5 mV/m contours on the 1957 and 1964 rate cards deviate less than plus or minus 10% from the area included within the 0.5 mV/m contour on the 1952 Smeby map.

21. In 1967, Grewe authorized and approved the preparation of a new WEIF rate card and coverage map by Miss Geri Henry, who was employed as a copywriter by WEIF from December 27, 1965, to October 30, 1967. Grewe did not know what sources of information were used by Miss Henry in drawing the coverage map on the 1967 rate card, nor did he recall ever inquiring of her as to what sources were used, because he didn't think her map was any different from that used previously. Miss Henry stated that she had copied the contours and the coverage map appearing on the 1953 rate card, a copy of which she had found in old files at the station. The area included within the 0.5 mV/m contour of the 1967 coverage map prepared by Miss Henry is slightly less than that included within the 1952 Smeby 0.5 mV/m contour. The 1967 rate card with its map as prepared by Miss Henry was shown to Grewe and he approved it. He

did not ask her on what she had based the contours shown on the map. Thereafter the 1967 map was copied into subsequent maps used by the station until December 1970.

22. By application dated July 18, 1968, the licensee requested an increase in power from 1 kW to 5 kW for station WEIF, which is the initial filing in the instant proceeding. Figure 2 of the engineering data supplied by WEIF's consulting engineers, Pete Johnson & Associates, in support of the application contained a map showing at 1 kW and at the proposed 5 kW the 0.5 mV/m contours of station WEIF. The 0.5 mV/m contour depicted on the 1968 Johnson map was based on Figure M–3 conductivities as adopted by the Commission in 1954, except in certain directions from the antenna where field intensity measurement data were utilized. The area included within the station's 0.5 mV/m contour on the 1968 Johnson map is somewhat less than the area shown on the 1952 Smeby map. According to Neil Smith, consulting engineer to the licensee, the discrepancy in coverage areas between the Johnson and Smeby maps could be attributed to the different methods by which the 0.5 mV/m contours were calculated.

23. With respect to the 1968 application to increase power and the 1968 Johnson map, prepared in connection therewith, Grewe stated that initial inquiries as to the feasibility of a power increase occurred in December 1965, and that the decision to go ahead with the application was made after July 1967. Pete Johnson & Associates, a firm of consulting engineers, was hired to do engineering work in connection with the application. During the course of the study by the Johnson firm, Grewe had some conversations with Kenneth A. Forney, his chief engineer, and with representatives of the consulting firm with respect to the interference problems the proposed increase in power might cause for nearby stations. Grewe was aware that field measurements were being taken to determine the extent to which the power increase would interfere with other stations. Grewe stated that while he did not specifically remember seeing any preliminary engineering work resulting from the engineering study prior to the time the application to increase power was filed with the Commission, he may have seen some preliminary contour maps "lying around," but no one presented them to him directly or explained what they represented to him.

24. On July 18, 1968, the Commission released its freeze notice on AM application, *Report and Order*, 13 FCC 2d 866 (1968), which became effective on July 19, 1968. Faced with the imminence of the imposition of a freeze on the filing of AM applications and the consequent need to expedite the filing of the application, the WEIF application to increase power, including the supporting engineering study, was presented to Grewe by his chief engineer on July 18, 1968, for his signature. Grewe inquired whether "everything was all right" with the application, and was assured by his chief engineer that it was. Grewe stated that he was not aware that the application to increase power contained a coverage map which was any different from the WEIF coverage map then in use on the station's rate cards.

25. In 1969 the rate card used by the station contained a coverage map which was reprinted without change from the coverage map appearing on the 1967 rate card. Only the rates were changed upon reprinting. The 0.5 mV/m contour appearing therein covers slightly

less area than the area included within the 0.5 mV/m contour in the 1952 Smeby map, and somewhat greater area than is covered by the same contour on the 1968 Johnson map.

26. Grewe claims that he did not know how many copies of the 1967 rate card and coverage map had been produced but the card was used by him and several salesmen as a sales promotional device. When the 1967 rate card and coverage map was reprinted in 1969, about 500 copies of the 1969 rate card were made for salesmen's use.

27. Grewe claims that the primary sales approach used in selling WEIF to area advertisers was to explain how WEIF, the only radio station in Marshall County, could deliver Moundsville and Marshall customers in WEIF's service area to the big shopping areas such as Wheeling and Martinsville, West Virginia, on the periphery of WEIF's service area where the station's signal was not as strong. The coverage map was not an important sales tool at WEIF according to Grewe because he had done business with most of his advertisers for years and consequently did not have to rely on a coverage map. Nevertheless, the coverage maps were used to respond to requests for information about the station from advertising agencies, political campaign organizations, and others, and were also distributed by the station's salesmen to prospective and actual advertisers.

28. The 1969 rate card and coverage map continued to be used by WEIF until December 1970, when Grewe was informed by his Washington counsel that it was alleged that WEIF was using a deceptive coverage map according to the Supplemental Petition to Deny filed by WKWK on December 18, 1970. After investigation, upon comparison of the 0.5 mV/m contour on the 1968 Johnson map with the 0.5 mV/m contour appearing on the coverage maps on the station's rate cards then and formerly in use by WEIF, it was determined by Grewe and Forney that the 0.5 mV/m contour on the 1968 Johnson map did not agree with the 0.5 mV/m contour the station had been using on its coverage maps in the preceding years. The 0.5 mV/m contours on the coverage maps that had been used by WEIF since 1964 when Grewe assumed control of the station and until December 1970, encompassed substantially the same area as the 0.5 mV/m contour in the 1952 Smeby map. The area represented by 0.5 mV/m contours on such WEIF coverage maps was somewhat larger than that depicted on the 1968 Johnson map.

29. Upon being made aware of the difference in the area covered between that indicated on the 1968 Johnson map and on the rate card coverage map then in use, Grewe promptly withdrew the inaccurate rate card from circulation in December 1970. Thereupon a new rate card similar in all respects to the one then in use was prepared except that it did not contain a coverage map. The 1970 rate card was used until January 1, 1973, when it was replaced by the station's current rate card. Similar to the 1970 rate card the 1973 rate card did not contain a coverage map. The station has used no coverage maps since the withdrawal of the 1967 rate card in December 1970, except for a coverage map prepared in 1973 by the station's chief engineer, at the request of the Mutual Broadcasting Co., upon WEIF's change in affiliation from the ABC network to the Mutual network. The 0.5 mV/m contour on said map is as depicted on the 1968 Johnson map.

Copies of the 1973 coverage map have not been generally circulated, and only Mutual Broadcasting Co. has received it.

CONCLUSIONS

WKWK's Withdrawal from Participation

1. Before proceeding to the conclusions reached by the Presiding Judge on the designated issues, reference is made to actions taken herein by the petitioner WKWK, and on its behalf, which raise the question of whether such actions constitute an abuse of the Commission's process. As above recounted, on the day of the hearing the petitioner withdrew from further participation in the proceeding. This action is reflected in a statement by WKWK's counsel on the record at the hearing and in a letter from counsel to the Presiding Judge dated November 6, 1973, confirming the action taken. WKWK claims that its action was based on a careful examination of the exhibits previously submitted by WEIF and the Broadcast Bureau relating to the designated issues. WKWK concluded that these matters "have been adequately treated" and consequently in its view its further participation in the proceeding "would not serve any useful purpose and would only serve to delay the hearing." Following an explanatory statement by counsel for WKWK at the opening of the hearing to the same effect, the Presiding Judge adjured counsel to continue to participate in the hearing. Counsel nevertheless determined that his participation in the hearing would serve no useful purpose and he withdrew from the hearing. This determination by counsel and by his client presumably was carefully considered by them and was made in good faith. However, in this connection it is pertinent to point out that WKWK filed the Petition to Deny in this proceeding on December 16, 1968, more than five years ago. It was WKWK's petition which initiated consideration by the Commission and led to the ultimate issuance of the Order to Show Cause initiating this proceeding. In the Petition to Deny WKWK made various allegations purporting to raise suburban community, ascertainment of needs and financial issues. WKWK made further reference to these issues in its Reply to Opposition to Deny filed April 1, 1969, almost five years ago. And in a Supplemental Petition to Deny, filed by WKWK on December 18, 1970 (more than three years ago) following an amendment filed by WEIF on September 10, 1970, WKWK raised, *inter alia*, matters relating to the alleged fraudulent use of a rate card by WEIF.

2. In the Order to Show Cause instituting this proceeding the Commission considered all of the filed pleadings and determined that the hearing should proceed only on the financial and deceptive coverage map issues. A review of this record leaves some question as to whether WKWK has adequately explained its actions whereby it initially raised the financial and deceptive map issues which were designated for hearing and then effectively abandoned these issues by withdrawing from further participation in this proceeding. However on this record the explanation given for the action taken is considered superficially adequate. [cf. *New Era Broadcasting Company, Inc., et al.* 20 FCC 2nd 68, 76 (1969)]. With respect to the petitioner's possible contribution to the record at the hearing, based on a review of the entire record

it cannot be said that WKWK's participation in the proceeding should have been required [cf. *Ponce Television Corporation*, 40 FCC 2nd 73, 74 (1973)]. In resolving these questions in favor of the petitioner the Presiding Judge has considered the fact that while WKWK initially raised a number of issues including those ultimately designated for hearing herein, it was not until the Commission released its Order to Show Cause on August 1, 1973, that WKWK was made aware that the issues designated for hearing would be confined to the financial and deceptive map issues. Thereupon, presumbly it acted as speedily as possible following receipt and analysis of the exhibits which were distributed by the applicant and the Broadcast Bureau prior to the hearing. However it should be emphasized that by raising these issues as far back as 1969 and 1970 a responsibility was imposed upon WKWK to participate in the proceeding and in the hearing to assure the fullest development of a record on these issues. The fact that the petitioner may consider the issues ultimately designated as less substantial and significant than the issues which it initially raised but which were not designated for hearing, or that it had determined that it possessed no evidence to be submitted on the designated issues, in no way abrogates the petitioner's responsibility with regard to active participation. As the Presiding Judge pointed out on the record the petitioner's counsel may have determined that following the completion of the direct examination of witnesses for WEIF cross-examination of such witnesses might be called for. But counsel for WKWK did not see fit to remain in the hearing to pursue this course. However, since the Presiding Judge has resolved the questions concerning WKWK's actions herein in its favor and has determined that it and its counsel acted in good faith, the Presiding Judge has concluded that the record herein does not support a finding that WKWK abused the Commission's process in this proceeding.

Financial Issue (Issue 1)

3. In designating a financial issue the Commission found with respect to the applicant's financial qualification that it was not clear from the lender's financial statement that he had sufficient liquid current assets in excess of current liabilities to meet his loan commitment. The loan commitment from Fred A. Grewe, Jr., was for $30,000 to cover the costs of the proposed change in operations amounting to $20,673. Grewe's revised financial statement as of July 31, 1973, which was filed and accepted as an amendment appears to satisfactorily answer any question as to the sufficiency of Grewe's net liquid current assets. From the financial statement as supplemented by Grewe's testimony, it appears that Grewe's current liquid assets amount to $59,100 and his current liabilities amount to $18,612. Thus his indicated net current liquid assets amount to $40,488 which amount is more than ample to meet his $30,000 loan commitment to the applicant, the proceeds of which loan are intended to cover the costs of the proposed construction. Accordingly, it is concluded that the applicant is financially qualified.

Deceptive Coverage Map Issue (Issue 2)

4. With regard to this issue the Broadcast Bureau and the applicant both cite the Commission's holding in *Universal Communications of*

Pittsburgh, Inc., 17 RR 2d 1262–1263, (1969) wherein the Commission stated:

> * * * a licensee of this Commission is expected to deal candidly with the public. Use of inaccurate and exaggerated coverage maps will not be tolerated. Any practice intended to deceive or mislead advertisers or the public cannot be condoned.
>
> Your obligations to advertisers, whether local or national, is to deal with them in a candid and above-the-board manner. Care should be exercised in fulfilling this standard and full disclosure, as to both coverage and location, is essential in conforming to this standard.

Upon denial of a petition for reconsideration [18 RR 2d 491; 21 FCC 2d 542 (1970)], the Commission reiterated:

> The specific location of a station may or may not be of interest to an advertiser, but that is for an advertiser to decide, not a licensee. Full disclosure, as to both coverage and location, is essential in conforming to the standard of candor required of licensees. * * * It is the petitioner's obligation to show that the contours were accurately portrayed.

In initiating this proceeding the Commission also referred to its *Universal* decision.

5. The high standard of candor required of licensees enunciated by the Commission in *Universal* has been often reiterated [See e.g. *Seaboard Broadcasting Corp.* 42 FCC 2d 785, 788 (1973)]. The Presiding Judge has considered the licensee's actions in permitting an inaccurate coverage map to be distributed in the light of that standard.

6. The applicant has conceded that it distributed an inaccurate coverage map but asseverates that its actions were not intended to deceive or mislead advertisers or the public. It also makes various contentions relating to what might be characterized as mitigating or extenuating circumstances.

7. The rate cards which were employed by the applicant from 1964 until December 1970, contained coverage maps roughly based on a contour map prepared originally in 1952 by Lynne C. Smeby, a consulting radio engineer for a prior owner, in connection with an application to change frequencies. Presumably as urged by the applicant and as supported by the record the map was prepared in accordance with the Commission's Standards of Good Engineering Practices in use in 1952.

8. In 1968 the applicant initially submitted the instant application. In connection therewith, the applicant furnished an engineering exhibit depicting the station's 0.5 mV/m contour prepared by Pete Johnson & Associates, WEIF's consulting engineers, which was based on the Figure M–3 conductivities adopted by the Commission in 1954 (FCC 54–263, released February 25, 1954, Docket 10604). In preparing the Johnson map actual field intensity measurements were made. Thus it appears that the differences between the 1952 Smeby map and the 1968 Johnson map can be ascribed to the different bases upon which they were developed.

9. The coverage maps used on the rate cards by WEIF between 1964 and 1970 (which were roughly based on the 1952 Smeby map) actually indicated a 0.5 mV/m contour and an area coverage less than that shown on the 1952 Smeby map but somewhat greater than that shown on the 1968 Johnson map. In December 1970, the then current rate card was withdrawn following discovery of this fact by Grewe,

who as principal officer and stockholder of Grewe Radio, Inc., constituted the management of the station. Thereafter the station was called upon on only one occasion to supply a coverage map and at that time the Johnson map was furnished.

10. The applicant claims that the coverage maps used by WEIF prior to 1968 were substantially correct and were copied, albeit roughly, by Grewe and Henry in good faith from the 1952 Smeby map. Presumably prior to 1968 the licensee felt no need to develop a new engineering study and a 0.5 mV/m contour map which would be based on the Commission's 1954 Figure M–3 conductivities. But with the filing of the instant application in 1968 the need for a new engineering study and for such a map arose.

11. Although there is some question as to whether the continued use of a coverage map based on an approach which was superseded by Commission order in 1954 should be condoned, the Presiding Judge has concluded that under the circumstances reflected in this record the licensee cannot be faulted for its continuing use of such a coverage map prior to 1968. However, quite another question is presented by the licensee's use of such a map after 1968, following the filing of an application which included a map which showed an area coverage somewhat larger than the area shown on the rate cards in use by WEIF from 1968 to December 1970. The applicant attempts to explain this away by stating that the practice was not intended to deceive or mislead since Grewe (the licensee's principal stockholder and operating officer) was wholly unaware of the Johnson contour until he was so advised by counsel after the filing of the supplemental petition in 1970 which alleged a disparity between the Johnson and Smeby maps.

12. The Broadcast Bureau avers that there is no evidence that the employment of the deceptive map from 1968 to 1970 was willful or intentional but characterizes Grewe's failure to know the extent of the station's coverage as careless. In recommending the grant of the instant application the Broadcast Bureau posits that while the use of the deceptive coverage map was careless its use was not intentional or willful and consequently a deniel is not warranted. The Presiding Judge agrees with the Bureau that there is no evidence in this record to support a finding that the use of the deceptive coverage map was willful or intentional. As a matter of fact the inaccurate map was promptly withdrawn immediately after Grewe was made aware for the first time of the inaccuracy in December 1970.

13. While Grewe's ignorance of the extent of coverage shown by the Johnson map may demonstrate a lack of willfulness by the licensee, it can not be gainsaid that the licensee did in fact permit inaccurate maps to be distributed. Whether such conduct was due to carelessness, ignorance, inadvertence, or reliance on technical or other subordinates, consultants or prior owners, such conduct can not be excused where advertisers and other members of the public either were or could have been deceived. The licensee is charged with knowledge of the contents of filings made with the Commission. The licensee must bear responsibility for the accuracy of such filings and for the accuracy of material distributed by it to the public. Just as the licensee must exercise the highest degree of care to assure that filings made with the Commission are accurate it must also take all the necessary steps to insure

that the public is not deceived. In this instance the licensee's prompt action to withdraw the map after its principal officer was made aware of the inaccuracy, the fact that the inaccurate map may not have been used extensively and the fact that since 1970 an accurate map has been used constitute mitigating or extenuating circumstances [cf. *Emerald Broadcasting Company*, 30 FCC 2d 879, 881 (1971)]. Accordingly, no sanctions are called for at this time warranting denial of the instant application and likewise on the basis of this record it appears that as of this time the applicant continues to possess the requisite qualifications to be a broadcast licensee.

14. While the factual evidentiary presentation in this record does not support the ultimate adverse finding on this issue leading to a denial of the instant application, the licensee's continuing practices and conduct will be a subject for consideration at the time application is made for renewal of the subject license or of any other license held by the owner of this licensee. Such consideration will be based on the particular record developed in connection with the particular renewal application [See *Grenco, Inc.*, 39 FCC 2d 732, 737 (1973) and cases therein cited].

Public Interest Issue (Issue 3)

15. The Commission designated as an issue the determination of whether, in light of the evidence adduced on the financial and deceptive map issues, a grant of the application would serve the public interest, convenience and necessity. In view of the Presiding Judge's conclusion that based on the entire record herein, WEIF has sustained its burden of proof with regard to both the financial and deceptive map issues, it is concluded that the grant of the instant application would serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, that unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of section 1.276 of the Rules, the application of Miracle Valley Broadcasting Company, Inc., (WEIF), Docket No. 19794, File No. BP-18338 IS GRANTED.

REUBEN LOZNER,
Administrative Law Judge,
Federal Communications Commission.

FCC 74-431

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request of
NEW CHANNELS CORP. FOR DECLARATORY RULING CONCERNING APPLICABILITY OF CROSS-OWNERSHIP PROVISIONS OF SECTION 76.501

APRIL 17, 1974.

WILLIAM P. SIMS, Esq.,
Dow, Lohnes & Albertson,
1225 Connecticut Avenue NW.,
Washington, D.C. 20036

DEAR MR. SIMS: On March 4, 1974, you filed a request for declaratory ruling on behalf of New Channels Corporation concerning the applicability of the cross-ownership provisions of Section 76.501 of the Commission's Rules (which preclude a television licensee from acquiring a cable television system located within the predicted Grade B contour of the station—computed pursuant to Section 73.684 of the Rules) to your proposed acquisition of Empire State Cable TV Co., Inc., which operates cable television systems serving the City and Town of Binghamton, Port Dickinson, Kirkwood, Johnson City, Fenton, Dickinson, Conklin, Chenango, and parts of Union, all in the State of New York. You state that Newhouse Broadcasting Corporation, licensee of Station WSYR-TV, Syracuse, New York, and of its satellite Station WSYE-TV, Elmira, New York, also owns 100% of New Channels Corporation, and that the predicted Grade B contours of both stations penetrate the boundaries of all or some of the communities listed above. However, you state that these ten communities also are located some sixty-eight miles from Syracuse and forty-eight miles from Elmira, and that Section 76.501 of the Rules does not apply to the proposed transaction, because an engineering statement submitted with your request demonstrates that the actual Grade B contours of Stations WSYR-TV and WSYE-TV do not penetrate any of the above cable communities.

When the Commission adopted the cross-ownership rule, we realized that there might be departures from the use of predicted contours, which is why we included the following provision: ". . . in unusual circumstances, there is of course always the possibility of taking into account a showing as to the actual contours." *Second Report and Order*, 23 FCC 2d 816, 821 Fn. 5 (1970). After considering the data you have supplied, the Commission is not convinced that Section 76.501 of the Rules is inapplicable, but it is persuaded that the actual Grade B contours both of Station WSYR-TV, Syracuse, New York, and of Station WSYE-TV, Elmira, New York, do not extend as far toward the

communities listed above as do their predicted Grade B contours, computed pursuant to Section 73.684 of the Rules. We, therefore, will waive Section 76.501 of the Rules to permit New Channels to acquire all of the issued and outstanding stock of Empire State Cable TV Co., Inc., and to operate the cable television systems presently serving the above New York communities, as designated by New Channels on the attached map. A condition of this waiver, however, is the New Channels will not be permitted to construct new cable television facilities in the areas where it indicates that it is only acquiring a franchise.

Accordingly, Section 76.501 of the Commission's Rules IS WAIVED, on the condition that New Channels does not construct any new cable television facilities, to enable New Channels Corporation to acquire the cable television systems presently serving the City and Town of Binghamton, Port Dickinson, Kirkwood, Johnson City, Fenton, Dickinson, Conklin, Chenango, and Union in New York State.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-413

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PARTS 0 AND 1 OF THE COMMISSION'S RULES TO REFLECT THE COMMISSION'S NEW OFFICIAL OFFICE HOURS

ORDER

(Adopted April 17, 1974; Released April 22, 1974)

BY THE COMMISSION:

1. We are amending Parts 0 and 1 of the Commission's Rules and Regulations to standardize the official office hours of the Commission's main offices located at 1919 M Street, NW., Washington, D.C., by eliminating the requirement that the Secretary's Office, the Mail Branch and the Fees Section, Office of Executive Director, and the Public Information Officer's office, remain open until 5:00 P.M.

2. Effective April 29, 1974, the official office hours of all the Commission's main offices will be from 8:00 A.M. to 4:30 P.M., Monday through Friday.

3. The District #24 Field Office of the Field Operations Bureau (located at 1919 M Street) and the Laboratory Division, Office of Chief Engineer (located at Laurel, Maryland) will continue as at present, from 8:00 A.M. to 4:30 P.M. The hours of all other Commission field offices are determined by local requirements and will remain unchanged.

4. Authority for this amendment is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended. (47 U.S.C. 154(i) and 303(r)). Because the amendment relates to procedural and internal management matters, the prior notice provisions of 5 U.S.C. 553 are inapplicable.

5. In view of the foregoing, IT IS ORDERED, that Sections 0.403 and 1.4 of the Rules and Regulations are amended as set forth in the Appendix hereto.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part 0 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Section 0.403 is revised to read as follows:

§ 0.403 Office hours.

The main offices of the Commission are open from 8:00 A.M. to 4:30 P.M., Monday through Friday, excluding legal holidays.

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended to read as follows:

Section 1.4(c) & (d) are revised to read as follows:
§ 1.4 Computation of time.

* * * * * * *

(c) All petitions, pleadings, tariffs, or other documents filed with the Commission must be tendered for filing in complete form before 4:30 P.M. Any such document lodged with the Commission in complete form after 4:30 P.M. shall be deemed to be tendered for filing as of the next succeeding business day.

(d) For purposes of this section, the term "holiday" shall include Saturdays, Sundays, legal holidays or half holidays in the District of Columbia, and any other day on which the Commission's Offices are closed prior to 4:30 P.M. The term "business day" shall include all other days.

* * * * * * *

FCC 74-461

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of PAGE BOY, INC. For Construction Permit To Establish Additional Facilities in the Domestic Public Land Mobile Radio Service at Islip, N.Y.	File No. 4014-C2-P (2)-72

MEMORANDUM OPINION AND ORDER

(Adopted May 1, 1974; Released May 6, 1974)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN; REID AND HOOKS ACTING AS A BOARD; COMMISSIONER QUELLO NOT PARTICIPATING.

1. The Commission has before it for consideration the above referenced application, filed December 28, 1971, a Petition to Deny, filed February 9, 1972, by MRN Services, Inc. (MRN), an opposition filed by Page Boy, Inc. (Page Boy) on March 24, 1972,[1] a Petition to Dismiss the opposition, filed on May 1, 1972, by MRN, a letter submitted by Page Boy and a reply to that letter filed by MRN.

2. Page Boy is the licensee of Station KEA860 in the Domestic Public Land Mobile Radio Service (DPLMRS) at New York city, offering one-way signaling service on the frequency 35.22 MHz. The present application is intended to add a satellite transmitter at Islip, New York, because of subscriber complaints of "dead spots" in service on Long Island. Page Boy states that one subscriber has engaged another carrier for service in the Suffolk-Nassau area, because of these reception difficulties. With the addition of a satellite transmitter at Islip, Page Boy believes it can overcome the difficulty.

3. In its Petition to Deny MRN says that it is the licensee of Station KED367 at Bay Shore, New York, operating on the frequency 454.20 MHz, in Suffolk County and part of Nassau County. This is a two-way station but since 1968, MRN has also been offering one-way paging on a secondary basis. MRN asserts standing by saying that addition of the Islip transmitter will allow Page Boy to expand into the area served by MRN, and thus will impair MRN economically.

On the merits, MRN says that need for the facility has not been established since Page Boy did not list the complainants, or the location of the "dead spots" or the conditions prevailing when difficulties occur. Secondly, MRN alleges that grant of the application would result in destructive competition to MRN. It recounts its fruitless efforts to promote its service (only 40 paging units) and the continuous losses

[1] Time for filing was extended by the staff.

it has suffered. It argues that grant of this application will dilute the existing market and could lead to the termination of the MRN service. Finally, and briefly, it says that the Page Boy proposal raises questions of monopoly and economic overreaching.

4. Page Boy in its opposition points out that it wishes to establish the satellite transmitter to improve service to existing subscribers, as it indicated in the application. It says that it has already received eight written complaints from subscribers and fears it will lose these and others if it cannot improve service. It relies on Commission precedents, *Radio Relay Corporation*, 26 FCC 2d 639 (1970), and *Phone Depots, Inc.*, 28 FCC 2d 405 (1971), that allowed existing carriers to add transmitter sites to improve service within the service contour. Regarding MRN's arguments about evidence of "dead spots", we will quote Page Boy's argument, since it became the subject of controversy:

> 7. MRN has questioned whether, in fact, reception is inadequate at Islip: In response, we respectfully refer the Commission again to our public need showing, which is a straightforward factual presentation, and which indicates that at least one former customer has already cancelled service due to reception difficulties. Again, we stand ready to provide the staff, subject to such information being kept confidential for obvious reasons, with all letters relating to need for the satellite facility. We also attach hereto further technical support prepared by our consulting engineer, Mr. Harold R. Walker. He recently measured the signal quality of KEA860 in the geographic areas to be served by the proposed satellite.

Finally, Page Boy says that there is absolutely no evidence of any "monopoly" issue. The technical report mentioned by Page Boy was included with the opposition filed on March 24, 1972. In addition, on March 29, 1972, it was submitted as an amendment to the application, showing the areas of poor reception.

5. On May 1, 1972, MRN filed a motion to dismiss the opposition, alleging that the opposition was dated March 21, 1972, the accompanying affidavit of Page Boy's president was dated March 12, 1972, and the technical report incorporated by reference was dated March 20, 1972. From this it concluded that the opposition was fatally defective and should be dismissed, citing *Rhinelander Television Cable Corporation*, 24 RR 1181 (1963).

6. On May 3, 1972, Page Boy filed a letter explaining the circumstances surrounding its filing. First, it stated that the affidavit was executed on March 17, 1972, although the "7" could be mistaken as a "2". The date on the opposition (March 21, 1972) was inserted by counsel after the draft sent to Page Boy had been corrected in final. Page Boy distinguishes *Rhinelander*, supra, since there no affidavit was submitted. Page Boy did submit one, that related primarily to facts already set out in the record. In addition, Page Boy offered a further affidavit from Page Boy's president, that among other verifications swore that the original affidavit was executed on March 17, 1972.

7. MRN filed a reply on May 2, 1972, saying that the Page Boy letter was an improperly submitted pleading and unacceptable. It also said that Page Boy tacitly admitted a pre-verification, and does not contain any affidavit that the affiant had the whole text of the opposition before him when he swore to it. It doubted that such an affidavit could be obtained, since paragraph 7 incorporates by refer-

ence an engineering statement dated March 20, 1972. From this it concluded that there is a question as to Page Boy's credibility.

DISCUSSION

8. Before reaching the merits of this controversy, we will attempt to resolve the question raised by MRN's Motion to Dismiss directed against Page Boy's opposition to the Petition to Deny. The original affidavit was submitted to the Commission, and on this it appears clearly to be dated March 17, but the "7" is written "7" which, we think gave rise to the misunderstanding. The other point has to do with paragraph 7 of the opposition, reproduced above. We note that the tests referred to in the engineering report were conducted on March 17, 1972, and so Page Boy's president may well have known of the results on that date. However that may be, the thrust of the paragraph clearly goes to information already on file or letters the applicant said it was willing to file. The engineering report is not incorporated by reference but only alluded to as "attached". We cannot say that this vitiates Page Boy's opposition or raises a question of its credibility. It was entitled to submit the engineering report as an amendment to its application at any time prior to designation for hearing (Section 21.23 of the Rules) and did so, on March 29, 1972, long before MRN raised the question of the affidavit date. The most we can conclude is that the engineering report was attached to the opposition after verification by Page Boy's officer, but we cannot see that this was of more than incidental importance. As to *Rhinelander, supra*, there the opposition was not accompanied by any affidavit, and was dismissed. Here there was an affidavit, valid as to all except two sentences. Accordingly, the most we would do is to strike those sentences, which appear to be senseless. We do not mean that we will tolerate carelessness in pleadings, but only that in this case, the point is minor.

9. On the merits of the case, we have concluded that Page Boy's application should be granted. Page Boy is an existing carrier, seeking to improve the service it offers to subscribers. This is a goal we have approved frequently, (see the case cited in paragraph 4 above). By its amendment of March 29, 1972, Page Boy has shown that there are "dead spots" in the present service area and we accept its statement that it has received complaints as showing that improvement is needed. Thus we think Page Boy has shown that a grant would be in the public interest. Against this MRN has offered nothing except speculation. We note that Page Boy is a New York city based, one-way carrier, whereas MRN is a Long Island based, two-way carrier. Page Boy's subscribers will, generally, be persons who travel between New York city and Islip, and these people MRN could not serve in any event. Thus, we conclude that MRN has not shown with any specificity how its service will be harmed by this grant. On the need for specificity in petitions to deny, and the circumstances in which hearings must be held, see *Hartford Communications Committee v. F. C. C.*, 467 F 2d 408 (D. C. Cir. 1972). In the present case we cannot see that a hearing would produce useful information or change our decision on the

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matter. Finally, we agree with Page Boy that MRN's allegation on "monopoly" is made without providing any foundation.

10. Accordingly, IT IS ORDERED that the Petition to Deny and the Motion to Dismiss, filed by MRN Services, Inc., ARE DENIED, and the application of Page Boy, Inc., File No. 4014–C2–P(2)–72, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-141

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PHONE-MATE, INC., COMPLAINANT *v.* AMERICAN TELEPHONE & TELEGRAPH CO. AND SOUTH CENTRAL BELL TELEPHONE CO., DEFENDANTS	Docket No. 19934

MEMORANDUM OPINION AND ORDER

(Adopted February 11, 1974; Released February 13, 1974)

BY THE COMMISSION: COMMISSIONER BURCH, CHAIRMAN; REID AND WILEY CONCURRING IN THE RESULT.

1. On August 21, 1973, Phone-Mate, Inc. (complainant) filed a formal complaint asking that the Commission find unreasonable and discriminatory under Sections 201(b) and 202(a) of the Communications Act, the telephone company practices, pursuant to AT&T's Tariff F.C.C. No. 263, of requiring an allegedly unnecessary protective device to be used with complainant's Phone-Mate automatic telephone answering devices.

2. The tariff provision in question is Section 2.6.4(B)(1) of AT&T's Tariff F.C.C. No. 263, the relevant portions of which are as follows:

> Customer-provided voice transmitting and/or receiving terminal equipment which involves direct electrical connection to the facilities furnished by the Telephone Company for long distance message telecommunications service may be used with such facilities in accordance with (a) and (b) following: (a) the connection shall be made through a Telephone Company network control signalling unit and a connecting arrangement which shall be furnished, installed and maintained by the Telephone Company. * * *

3. The essence of the complaint is that Phone-Mate automatic telephone answering devices may not be connected to the telephone network, irrespective of any actual demonstrable harm caused to this network, except through a network control signalling unit and connecting arrangement furnished, installed and maintained by the telephone company. Complainant asserts (1) that since Phone-Mate devices are powered by four flashlight batteries, they do not cause excessive voltages; (2) that tests conducted by an independent testing laboratory have shown that Phone-Mate devices cause no longitudinal imbalance; and (3) that since Phone-Mate devices are intended to answer incoming telephone calls, only limited network signalling functions are involved upon the seizing and release of the telephone line. Thus complainant maintains that Phone-Mate devices are harmless, and the telephone company practice of requiring a protective device is unreasonable.

4. In answer, defendants state that they have no affirmative duty to analyze each of the numerous models of customer-provided equipment in order to demonstrate in what way each product harms or is likely to harm the telephone network or telephone company personnel, and that this procedure is obviated by the requirement for a protective device. We note, however, that AT&T has already liberalized its tariff to provide for the direct electrical connection without a protective device, of certain customer-provided headsets and non-powered conferencing equipment. (*See* Section 2.6.4(E) of AT&T's Tariff F.C.C. No. 263).

5. We now have the benefit of five years operating experience under the AT&T interconnection tariffs, which were filed in 1968 pursuant to our *Carterfone* decision.[1] Based on this experience and the complaint raised by Phone-Mate, we are now prepared to institute an investigation to determine whether or not Section 2.6.4(B)(1) of AT&T's Tariff F.C.C. No. 263, as applied to Phone-Mate devices, sets "*reasonable* standards to prevent *harmful* interconnection" (14 F.C.C. 2d at 572; emphasis added). Thus, AT&T will be expected to demonstrate that its tariff is reasonable within the meaning of Section 201(b) of the Communications Act. We will also inquire into whether AT&T's tariff and practices operate to give an undue preference or other favorable treatment to customers who interconnect with Bell System terminal equipment rather than similar equipment offered by Phone-Mate.

6. It should be noted that prior to the filing of the instant complaint, defendant South Central Bell Telephone Company commenced a civil action against complainant in the Chancery Court for Knox County, Tennessee. That action, which is presently pending before that court, seeks, among other things, to enjoin complainant and others from inducing the violation of defendant's General Subscriber Services Tariff on file with the Tennessee Public Service Commission. Taking note of the instant complaint and recognizing that the ultimate result of this proceeding might assist the court in its determination, the court, on November 6, 1973, requested the FCC to expedite consideration of the instant complaint and to provide the court with such findings as may be of assistance to the court. In view of the Tennessee court's request, we will order that this proceeding be expedited. In furtherance of this objective, and in accordance with Section 0.365 of the Commission's Rules (47 C.F.R. § 0.365), we will provide for review of the initial decision by the Commission rather than the Review Board.

7. We should make clear the relationship of this proceeding to the Joint Board proceeding in Docket No. 19528. We recently stated in another proceeding concerning the lawfulness of certain provisions of AT&T's private line service tariffs, that the Joint Board proceedings are not concerned with the question of the lawfulness of any existing interstate tariffs; that questions concerning whether there if any justification under interstate tariffs for requiring carrier-provided protective connecting arrangements in particular cases would be resolved in separate proceedings; and that, if we find in such separate proceedings that protective devices are needed in the public interest, then the

[1] Carterfone, 13 F.C.C. 2d 420 (1968), *aff'd on reconsideration*, 14 F.C.C. 2d 571 (1968).

Joint Board would be concerned with whether to permit customers (or others), rather than the carriers exclusively, to provide any such devices. 42 FCC 2d 651–52 (1973).[2] Thus, in the instant case, we are not concerned with whether Phone-Mate or others may have the option of supplying the interfaces now supplied only by the carrier for direct interconnection of Phone-Mate, but whether there is any need for such interfaces and if so, whether any modification should be made in the characteristics of such carrier-provided interfaces and the practices of the carriers with respect thereto.

8. In view of the foregoing, IT IS ORDERED, That pursuant to the provisions of Sections 4(i), 201, 202, 205, 208 and 403 of the Communications Act, an expedited investigation is hereby instituted into the lawfulness of Section 2.6.4(B)(1) of AT&T's Tariff F.C.C. No. 263.

9. IT IS FURTHER ORDERED, That the scope of the proceeding shall include inquiry into the following issues:

(1) the operational, technical, economic or other effects of the use of the Phone-Mate devices in connection with the switched telephone network upon the operation of the telephone system used to provide interstate and foreign message telecommunications service to the public or upon the employees and facilities of the telephone companies providing such service or upon the public in its use of such telephone system;

(2) whether such tariff provision and the practices of the carriers with respect thereto as applied to Phone-Mate devices, are or will be unjust or unreasonable within the meaning of Section 201(b) of the Communications Act; or will make an unjust or unreasonable discrimination or will subject any person or class of persons to undue or unreasonable prejudice or disadvantage, or will give any undue or unreasonable preference or advantage to any person or class of persons, within the meaning of Section 202(a) of the Communications Act;

(3) whether the Commission should, pursuant to Section 205, prescribe any changes in such tariff provisions or the practices of the carriers with regard thereto insofar as Phone-Mate devices are concerned and, if so, what changes should be so prescribed.

10. IT IS FURTHER ORDERED, That the hearing in this proceeding shall be held at the Commission's offices in Washington, D.C. at a time to be specified by the presiding Administrative Law Judge; and that such Administrative Law Judge shall, upon the closing of the record, prepare and issue an initial decision, which shall be subject to the submittal of exceptions and requests for oral argument as provided in Sections 1.276 and 1.277 of the Commission's Rules (47 C.F.R. Sections 1.276 and 1.277), after which the Commission shall issue its decision as provided in Section 1.282 of the Commission's Rules (47 C.F.R. Section 1.282).

11. IT IS FURTHER ORDERED, That AT&T and South Central Bell Telephone Company are hereby named PARTIES RESPONDENT herein.

[2] See also 41 FCC 2d 239, 240.

12. IT IS FURTHER ORDERED, That a trial staff of the Common Carrier Bureau shall participate and be separated both from the Commission and from the Administrative Law Judge. (See *In re AT&T*, Docket 18128, 32 FCC 2d p. 89, 90 (1971))

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74–458

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CONSIDERATION OF THE OPERATION OF, AND POSSIBLE CHANGES IN, THE PRIME TIME ACCESS RULE (§ 73.658(k) OF THE COMMISSION'S RULES)	Docket No. 19622

MEMORANDUM OPINION AND ORDER

(Adopted April 25, 1974; Released May 2, 1974)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN; AND REID CONCURRING IN THE RESULT.

1. The Commission has before it the three timely-filed petitions seeking reconsideration of the *Report and Order* in the above-captioned proceeding, released February 6, 1974[1] which amended § 73.658(k) of the Commission's Rules, the prime time access rule. In its previous form (in effect until September 1974) this rule limited the amount of network and off-network programming during prime time to three hours each evening, with certain specific exceptions for fast-breaking or on-the-spot news coverage and for political broadcasts by legally qualified candidates for public office. "Prime time" is defined as the 4-hour period between 7–11 p.m. E.T. and P.T., 6–10 p.m. C.T. and M.T.[2] The Commission amended the prime time access rule in the February 1974 action in essentially the following ways:

(a) There are no more restrictions on the programs which stations subject to the rule (network outlets in the top 50 markets) may carry during what has been the first half-hour of prime time (7–7:30 p.m. E.T. and P.T., 6–6:30 p.m. C.T. and M.T.).

(b) There is no restriction on the use of prime time on Sundays. It appears that CBS and NBC, at least, will use the full four hours of prime time on Sundays for network programs.

(c) The only remaining restrictions are tied to a definite time period Monday–Saturday, the period from 7:30 to 8 p.m. E.T. and P.T. (6:30–7 p.m. C.T. and M.T.). These six half-hours may not be used for network or off-network material, or feature film, except that one of them each week may be used for network or off-network programs of certain types—children's "special" programs, documentaries, or public affairs programs. CBS has announced plans for a series of children's "specials" Saturdays from 7:30 to 8 p.m. E.T., and NBC has plans to use the whole hour on most Saturdays, 7–8 p.m. E.T., for a news docu-

[1] FCC 74–80, 44 FCC 2d 1081, 29 RR 2d 643, 39 F.R. 5585.

[2] The original rule was promulgated in May 1970 (23 FCC 2d 382), amended upon reconsideration in August 1970 (25 FCC 2d 318) and is in its currently effective form in § 73.658(k) of the Commission's Rules.

mentary program series. The ban on feature film from these periods is the subject of two of the three petitions for reconsideration.

(d) Certain other provisions were adopted concerning sports "run-overs", time-zone difference problems, etc., which probably overall amount to some liberalization of the rule, although not very much in relation to the practice which developed under it with respect to waivers in such cases. These are discussed below in connection with the petition of Sandy Frank Program Sales, Inc.[3]

2. Petitions for reconsideration of this decision were timely filed on behalf of three parties—film producers and distributors MCA, Inc. (MCA) and United Artists Corporation (UA) which also filed a petition for stay, and Sandy Frank Program Sales, Inc. (Frank) a syndicator of first-run access-period programming. Frank also filed a petition to accept a petition of more than 25 pages (see § 1.106(f) of the Rules); this is granted and the petition is accepted.[4] In substance, UA and MCA seek reversal of the decision to bar feature films completely from the 7:30–8 p.m. access periods (MCA proposes that the ban should be at least lifted for one night a week). Frank strongly supports the rule in its previous form (plus the ban on feature film) and opposes the relaxations adopted; it also urges tightening up the application of the rule by denial of most waiver requests, and the adoption of an "anti-stripping" rule which would bar "multiple showings" of the same series material during the access periods of a given week.

3. In the interests of brevity, we do not repeat here the entire background and history of the rule, nor the reasons for the modifications recently adopted except as they directly pertain to the contentions of the petitioners and the opposing parties mentioned below.[5] In the following paragraphs there are set forth in summary the arguments of the petitioners, first UA and MCA and then Frank.

THE MCA AND UNITED ARTISTS PETITIONS CONCERNING FEATURE FILMS

4. These two parties, film producers and distributors, vigorously oppose the change in the rule which would bar completely "feature film" from the Monday-Saturday 7:30–8 PM (E.T.) half hours. Their arguments, which are much the same and are discussed together herein, are generally that this is an unwarranted restriction, which really in effect amounts to a "blackout" of non-network feature film entirely in prime time, as to stations subject to the rule, causing great harm to the independent motion picture production and distribution industry

[3] Although not embodied in the new rule, the decision (FCC 74–80, par. 88) set forth also the Commission's expectation that stations will devote an appropriate portion of the "cleared" time periods, or at least of total prime time, to material of particularly local significance—programs designed for children, material relating particularly to minority needs and problems, and other material particularly designed to meet the needs and problems of the station's community and service area as determined in its ascertainment efforts.

[4] Two other petitions for reconsideration were filed. One, by Screen Gems Division of Columbia Pictures Industries, Inc., has been withdrawn; the other, by Motion Picture Association of America, Inc., arrived at the Commission on March 20, two days after the closing date for petitions, and thus is late. Since the period for seeking reconsideration of a Commission action is statutory, it cannot be waived. However, this petition was later re-tendered as a statement in support of the MCA and UA petitions (its position is basically the same as theirs) and is considered and discussed below as such.

[5] For the history and background of the rule, see the Report and Order herein, FCC 74–80, pars. 4–25 (29 R.R. 645–656); see pars. 79–112, 44 FCC 2d 1132–1145, 29 R.R. 2d 695–709, as to the reasons for the changes made in the rule.

and the public, and meaning that the networks (not subject to such restrictions) will tend to be the only sources of prime time movies, so that their power and dominance will be increased rather than lessened. These parties also claim that the restriction is over-broad and violates important First Amendment and anti-censorship prohibitions.

5. *The asserted effect of the restriction.* It is claimed that, whereas the Commission regarded the recent changes as a relaxation of the rule, in this respect the change is an increased and unwarranted restriction, affecting not only the particular half-hour specified but also the whole of prime time and late afternoon "fringe" time. In our recent decision (par. 86) it was stated that while licensees would lose some flexibility as a result, with respect to the 7:30–8 PM period, they were gaining it as to the 7–7:30 half hour, and thus could still present movies in the early evening. These parties assert that this is meaningless; affiliated stations in substantial numbers simply cannot be expected to run movies during hours such as 5:30 or 6 to 7:30, at the expense of early local and network news, nor, probably, would the Commission be happy if they did. Weekend evenings do not present this exact problem to the same degree, but MCA asserts that these hours on weekends are and will be taken to an increasing extent by network programming—on Sundays regularly beginning at 7 PM E.T., on Saturdays beginning at the same time for NBC affiliates at least, and, for all networks, increasing time for sports and other "specials" in the late afternoon. As to the later portion of prime time, 8 PM E.T. and after, it is asserted that preemption of network programs to present local movies will not be significant, since, with all of the movies having to fall during network hours, this will mean 90 minutes or two hours out of three hours of network material on a given evening, more than most stations will consider preempting. MCA asserts that there has been a sharp drop in prime-time preemptions by top-50-market affiliated stations for local movies from 117 per month in March 1969 (7:30–11 p.m.) to 33 in November 1973 (8–11 p.m.), but see footnote 13, below. This is attributed not only to scheduling problems, but to the fact that much of the local and other non-network advertising support for prime-time programs has been absorbed under the rule by "access programming." UA asserts that late evening time on these stations is largely unavailable for movies because of the local news and late-evening network programs, so that the only time left on affiliated stations for syndicated motion pictures is often morning and early afternoon, when only small audiences are available.

6. Therefore, it is claimed, there will be virtually a "blackout" on use by individual affiliated stations of feature films during prime or "fringe" time, to the serious detriment of the public and the motion picture production and distribution industry. It is urged that the market for feature films sold in syndication will be substantially curtailed, since stations will not be seeking material for such use, and what demand by stations remains will be only at considerably lower prices, reflecting the smaller audiences available at the remaining times and thus the lesser advertising support which will be forthcoming. These parties state that the prime-time rule has already led to a decline in syndicated sales of feature film of about 12% between

1972 and 1973 (from $49.5 to 43.6 million)[6] and this trend will simply be increased by the new restriction. UA points out that syndication sales of feature film, though currently less than the sales of theatrical features to networks ($57 million in 1973), are very important to the motion picture production industry, being relied upon to recoup production costs; and the sharp reduction in such income will have a depressing effect on both the number and the quality of motion pictures produced. The bargaining position of motion picture producers will be impaired. Thus these companies—already suffering from the impact of a number of developments such as the general decline in theatrical receipts with the growth of television, and administrative restrictions such as the "anti-siphoning" restrictions on film use on pay cable and subscription television, as well as the prime time access rule—will be hurt even further under the new ban. MCA asserts that two of the companies, Columbia Pictures and MGM, already have substantial problems.

7. It is claimed that the public will also lose substantially, both from the unavailability of movies in prime time other than on a network basis—which means that 60% or more of the potential audience will not have seen a desirable movie even after two network runs—and from the lower quality and freshness of material available at other times, because of the general depression of the market and lower price levels referred to above. It is claimed that there will no longer be the healthy program production industry we have found in the past to be necessary for the continued functioning of both broadcast and cable television (see *Cable Television Report and Order*, 36 FCC 2d 141, 169–170 (1972)).

8. Another argument is that the weakening of the syndication market for feature films will simply increase network dominance, as the only prime-time market left for movies, as to which they will be unrestricted. It is urged that this is hardly consistent with the purpose of the prime-time rule. MCA argues that the networks will simply take more of the available product and keep it for a longer time, rather than being limited to a period such as two runs which is the basis on which MCA now seeks to sell to its network customers.

9. *The legality and propriety of the total restriction.* Both of these parties, particularly UA, urge that this total ban on use of features during the access period is unconstitutional as an over-broad restriction violative of the First Amendment, is illegal censorship, and interference with licensee judgment in programming, and improperly discriminates against feature films and their producers and distributors, in favor of other material and suppliers such as game shows and their producers, who are not subject to restrictions under the rule. UA claims that both sets of producers and sellers are equally "independent" and should be similarly treated; any Commission action to the contrary, based on its idea of what is "good for the public", is illegal and beyond its power.

10. The argument essentially is that the total ban on feature film

[6] These figures represent syndicated sales of theatrical features and short subjects to all stations. MCA estimates that 95% of this represents sales of features, and 70% of it is sales to top-50-market stations (apparently including independents as well as affiliates).

during access periods is a restraint on First Amendment rights—freedom of speech and expression, on the right of stations to present, and viewers to have available, certain kinds of programs at certain times—and thus sustainable only when justified by a *compelling need* rather than mere "public benefit", and only if it is sufficiently narrow to be fully justified by that need.[7] It is claimed that the restriction fails completely to meet these standards; from the standpoint of providing more diversity of programming and curbing network control and monopoly, the new rule not only does not meet a compelling need or even provide a public benefit, but is counter-productive, lessening diversity and increasing network dominance. It is contended that this is clearly censorship, whatever the Commission may say about it—telling stations what they may and may not show, and viewers what they may or may not watch, particularly objectionable in that feature films are very popular with viewers. UA claims that the small amount of time involved, a half-hour, is no answer to this argument, because the effect goes far beyond that, in practice embracing all of prime time and late afternoon time as well. Moreover, it is urged, the idea of permitting some material during hours of small audience but banning it from high viewing periods is itself a violation of freedom of speech, like an ordinance limiting political speeches in the town square to hours when no one is likely to be on the street. Such an approach is also objectionable in that it limits the *production* of material by barring it from profitable hours.

11. These parties agree that the restrictions on feature films adopted in the original rule, and later modified and clarified in some respects, are artificial and not to be desired; but UA asserts that this is no reason to adopt an approach removing them but substituting "total injustice". It is claimed that rather, the earlier restrictions should be removed and the whole subject left to the free operation of the market place.

12. UA claims that the feature film ban should be repealed entirely; MCA suggests the approach of permitting them during one of the cleared access half-hours each week. This, it is said, would give licensees more flexibility and freedom to exercise their programming responsibilities, would make desirable material (locally originated movies) available to the viewing public, who may not have been able to see them otherwise (if they were not on a network or viewers missed the network showings), provide a vital source of revenue for the motion picture production industry, and encourage preemption of network programs (e.g. the hour from 8 to 9 p.m. if the movies start at 7:30).

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[7] The following authorities are cited by MCA, UA, or both: *Mount Mansfield Television, Inc.* v. *FCC*, 442 F. 2d 470 (C.A. 1971) in which the prime time rule was affirmed against this line of attack as well as others; UA contends this was probably wrong and certainly so in light of experience under the rule, and in event the restrictions involved there did not go this far; *National Broadcasting Co., Inc.* v. *U.S.* 319 U.S. 190 (1943), affirming the Commission's network regulations but emphasizing the concept of licensee and viewer *freedom*, rather than restrictions; *Associated Press* v. *U.S.* 326 U.S. 1 (1945); *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367; *U.S.* v. *Midwest Video Corp.*, 406 U.S. 649 (1972), noting Chief Justice Burger's concurring statement that the Commission's rules requiring cable program origination strains the outer limit of the Commission's powers; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952), holding that motion pictures fall within the protection of the First Amendment; *Banzhaf* v. *FCC*, 405 F. 2d 1082 (C.A.D.C. 1968); *Brandywine Main Line Radio, Inc.* v. *FCC*, 473 F. 2d 16 (C.A.D.C. 1972) (dissenting opinion of Bazelon, C.J.); and the dissenting opinion of Mr. Justice Black in *Scales* v. *U.S.*, 367 U.S. 203 (1961), to the effect that where First Amendment restraints are involved, mere "public benefit" is not sufficient justification.

THE SANDY FRANK PETITION FOR RECONSIDERATION

13. Sandy Frank is a syndicator of access-period programs, doing business under various corporate names, who has benefitted considerably from the prime time rule in the form it has had until our recent amendments, and who vigorously opposes the changes made. His lengthy petition for reconsideration, accompanied by a lengthy personal statement, asserts that the changes curtailing the amount of cleared access-period time will have a catastrophic impact on him and other independent producers who answered the Commission's call to produce first-run non-network programming, by sharply reducing the number of time slots which will be available for their material. It is also urged that the Commission should tighten up in administration of the rule, granting no waivers except in established situations such as sports runovers (and particularly no waivers for "off-network" material) and also that we adopt what is in effect an "anti-stripping" rule, barring exposure of material from the same program series more than once a week during the access period.[8] Frank states that he did not participate earlier in this proceeding because of limited resources and fear of reprisal from opposing major interests (though his position was informally presented to the Commission); but now, with the survival of his and other independent production and syndication entities seriously jeopardized by the rule changes made, he is coming forward (it is stated that only the really large units in the business are at all likely to survive).

14. The petition first outlines what are called "first principles", or the original purposes of the prime time access rule, which are said to be: to decrease network domination of television broadcasting; to provide opportunity for the development of new, diverse and independent program sources; and to reestablish conditions under which licensees can, to a substantial extent, exercise their responsibilities as trustees, meeting the needs and interests of their communities and service areas, as contemplated by the Communications Act.[9] By the rule, licensees are freed from the very real compulsion of having to clear network programs every night from 7:30 to 8, and from the economic temptation to present inexpensive off-network material from 7 to 7:30, and can use their own judgment as to what the public interest requires in their areas. It is asserted that the rule was adopted after years of study, to reverse a trend toward increased network dominance in such developments as increased use of prime time (3 to 3½ hours) and expansion into many non-prime hours, and increased control over their own schedules starting in the late 1950's as advertiser-licensed programs sharply decreased in number.[10] Certainly, nothing has changed since 1970 to make these considerations less important: and the original rule and its concept of 42 cleared half-hours should have been left as it was (except for stripping and waivers, assertedly the rule has

[8] Except for the last "anti-stripping" point, much of the Frank petition is similar to the earlier arguments of parties such as NAITPD.

[9] Frank recognizes that the networking system has produced some good results, but claims that U.S. broadcasting is intended to be a system of individual licensees meeting local needs and interests, not a centralized, monolithic system producing tightly controlled national programming through the network "funnel", with the conformity and standardization which that is likely to entail.

[10] For a discussion of the background of this matter, see Report and Order, pars. 4–25.

worked, and there is no warrant for reversing it by reducing "cleared" time by 64% or more).

15. Mr. Frank states that the Commission concedes in the Report and Order (pars. 82, 85, 89) that the rule as it was did not have a full or sufficient test, but nonetheless has acted drastically to reduce the number of "cleared" access periods, without any justification except, apparently, a view that this might mean "better" programming, a judgment which is both premature and basically improper anyhow (since the Commission cannot properly get into this area and specifically, and wisely, eschewed it in adopting the rule in 1970). He argues that the 42 half-hours adopted in 1970 themselves represented a reduction from the "50-50" rule originally proposed in 1965, and certainly should not be cut further, since the remaining half-hours (no more than 15) are simply not enough to support a viable, broadly based syndication industry, which needs a large number of placement opportunities if it is to function properly. Therefore the Commission should return to the rule, and not act to jeopardize the continued existence of entities it encouraged to come into the business. The small amount of time is particularly bad because the Commission apparently relies on it also to fulfill other objectives such as children's programs and material of particular local significance—all will be short-changed.

16. It is urged that the three main areas of reduction are all unjustified, based on erroneous conclusions. As to removal of all restrictions on the present half-hour (7–7:30), Frank contends that the Commission is taking a negative and self-defeating view in refusing to get into a contest between off-network material and stripped game shows: the appropriate remedy is to ban stripping or "multiple exposure" as discussed below. It is asserted that better programming will be forthcoming as producers and syndicators get money (profits from current successes) to start producing it, and that the same objectives—limiting network control directly and through use of "off-network" product—apply in this respect as much as ever. Mr. Frank claims that permitting off-network product during this period will also work to the disadvantage of local and network newscasts, which the Commission apparently favors, by beating them in the ratings. The added time permitted for network programming—both on Sundays and the hours for children's or news-documentary-public-affairs material—is said to be completely unwarranted, in the absence of a full test and the continued existence of the "network dominance" problem. It is said that if producers and syndicators can continue to have the previous amount of time available, they will be able, from their profits, to present better material (Frank mentions plans for sports programs and children's specials). This potential will be lost with the rule changes made. To the extent that "good" programming is advanced as the justification for increased network hours other than Sundays, such as the NBC and CBS proposed Saturday scheduling, the networks still have 126 half-hours a week of their own prime time, some of which can and should be expected to be used for such purposes. Mr. Frank states that he has plans for programming of these types, if permitted to continue under the 1970 rule. The possibility of "plowing back" profits from successful access-period programs, into more ambitious undertakings, is emphasized.

17. Mr. Frank supports the total ban on feature film during the access period as adopted, as an appropriate effort to clear these hours for *new* material; and, to increase still further the possibility of access by as many different programs and sources as possible, he would adopt an "anti-multiple exposure" rule, providing that except for local news and public affairs, stations may not present "multiple exposures of the same program series in access time during the same week." This would bar "stripping" of game shows such as *To Tell the Truth* and *Truth or Consequences*, and also the twice-weekly presentation of other game shows such as *Hollywood Squares* and *Let's Make a Deal*. The argument is that this will increase program diversity and also provide access for many more individual program series. For example, during the 6:30–7 PM (C.T.) period in Memphis, all three stations strip game shows Monday–Friday, meaning three programs, whereas ideally there should be 15. Even in a more typical market such as Detroit, there are now only 10 individual programs during this half-hour (one stripped, *Hollywood Squares* twice, and 8 once), which will be only 9 this coming year when *Let's Make a Deal* is also presented twice. Thus, many more producers will be able to share in purchases by stations; it is said that each half-hour weekly program series is worth about $75,000 for 52 weeks in this market, or $1,125,000 for 15 programs which should be presented. Mr. Frank also asserts another possible consequence of our rule changes: if stations may freely strip off-network material during the 7–7:30 period, they may well do so and move their present stripped game shows to 7:30, reducing the number of separate programs still further. It is claimed that his change will prevent licensees from "taking the easy way out", and will result in greater program choice and more opportunity for independent program suppliers, who can raise their prices as individual programs become more popular and stations can pay more; competition will then force the individual program producers to spend more on their material, and better programming will result.

18. Mr. Frank also urges that "administrative problems" do not justify the changes made; rather, the Commission should dispose of them by tightening up the administration of the rule. It is asserted that only in a few situations are waivers warranted (sports runovers and possibly a few other); certainly never in the "off-network" situations. In these cases, it is claimed, the suppliers of programs such as *National Geographic* have already had the benefit of one network run, and the access period should be preserved for the benefit of those who answered the Commission's call. If a licensee believes such a program deserves further prime-time exposure, he may, and should be required to, preempt network programs for it. The same is true of children's "special" programs, network or off-network; a 7:30 starting time may be desirable, but it is not sufficient justification for shattering the rule. Otherwise, Mr. Frank does not object to waivers or a rule to accommodate occasional sports runovers (provided the events are reasonably scheduled so as to end by 7 PM E.T. as the changed rule provides), the "political broadcast" or "on-the-spot" news coverage exemptions which have been slightly broadened in the changed rule, or the provisions for pre-game shows and "Summer Olympic" situations contained in the new rule (each network is allowed five pre-game

shows per year, and an exemption is granted for them to use the 7:30 period on nights when they devote all of their three hours of prime time to an international sports event or other "special" programming except movies). However, there is objection to the provision of the changed rule (Sec. 73.658(k)(2)(ii)) which deals with time-zone-difference situations where simultaneous network programming is involved and where the rule would simply be waived as to Mountain and Pacific time zone stations in these situations. Mr. Frank maintains that such stations should be required to clear access time *after* the sports event if it preempts access periods in the early evening.

19. Mr. Frank's personal statement, attached to his petition, contains allegations about the syndication business and the impact of the changes. It is stated that NBC's station in Chicago would have taken *Treasure Hunt* for this coming year but did not do so when the rule was revised, and ABC's Detroit station bought *Name That Tune* instead of renewing *Treasure Hunt*, whereas it would have taken both under the present rule; these two developments mean a loss of nearly $200,000 for a year, and overall the loss is at least $500,000. (Frank's revenues were $1.3 million in 1973–74 and will be the same this year if the rule is changed, but would be $1.6 million with the old rule in effect, meaning a break-even instead of a $300,000 profit, and no money for development of new programs compared to $100,000 if the rule remains the same). It is claimed that under the new rule there will be, at most, 15 access half-hours per market per week (7:30–8 Monday–Friday), with some 14 programs fighting for these (11 established programs including *Treasure Hunt*, plus 3 others such as *New Candid Camera*, *Name That Tune*, and *Salty*, a children's show). Since two of these are game shows shown twice a week, right there there is more demand than there are half-hours, and this does not include numerous other popular programs (*Concentration*, *Sale of the Century*, *Dealer's Choice*, etc.) or the amount of the access time which is expected to be used for station's *local* efforts. In short, the situation will be a disaster and particularly bad for Frank's *Name That Tune* show, which uses 10 live musicians and is relatively expensive to produce, and whose revenue may be cut from $2.5 million to $1.5 million. Mr. Frank states that he needs to market two successful shows to stay profitable. It is said that the shortage of time for these programs will certainly mean the end of production and development of other kinds of programs only marginally profitable, such as children's programs, sports, documentaries, off-beat entertainment, and "High School Quiz Bowl" programs. It is urged that at least the new rule should be stayed for a year, to give such entities a chance to adjust and avoid irreparable injury.

MATERIAL IN RESPONSE TO PETITIONS

20. Seven pleadings responsive to the above petitions for reconsideration were filed, including six oppositions and one statement (by the Motion Picture Association of America, Inc. (MPAA)) supporting the film producers' petitions. Of the six, three (ABC, Time-Life Films, and the Association of Independent TV Stations, Inc. (INTV)) oppose the film producers' petition; four oppose the Sandy

Frank petition entirely or in part (ABC, CBS, NBC, and MCA-Screen Gems in a joint opposition).

21. *Oppositions to the MCA and UA petitions.* The main lines of argument urged against the MCA and UA petitions are: (1) the restriction is not censorship, as claimed, since the rule does not bar feature films from television or attempt to control their content but only relates to one small part of the day and not even that as to independent stations which operate in some 36 of the top 50 markets; and, in any event, this was settled by the 1971 *Mount Mansfield* decision sustaining the earlier rule including a not greatly different restriction, and any argument along this line would of course apply to much more than feature film; (2) to change the rule in this respect now would be to upset the delicate balance reached over-all, depriving independent producers of access time to which they are clearly entitled and requiring another look at the whole question (Time-Life claims that we would have to increase the number of access half-hours accordingly); (3) the "majors" are not really hurt by this change, which is not a significant departure from the previous rule, but actually have benefitted from the recent course of television programming and regulatory developments, including our actions;[11] and (4) the total restriction on network-affiliated stations will work to the benefit of independents in the same markets (and UHF stations), in making desirable feature film more readily available to them and restricting its use by their powerful affiliate competitors.

22. *Oppositions to the Sandy Frank petition.* ABC's opposition to the Frank petition is simply that of "administrative finality", the desirability of getting the prime-time-access question settled. It urges that the recent decision represents a reasonable balance and compromise, and should be affirmed. NBC's opposition (which does not include the "anti-stripping" proposal) is for similar reasons—reliance on the rules adopted by parties planning for this coming season, including NBC's rescheduling of its Sunday evening programming, with longer movies, and news-documentary or children's programming from 7 to 8 p.m. E.T. on most Saturdays. The CBS opposition asserts that the Frank petition advances nothing new which could provide basis for change, and that the decision, while it could be more explicit, represents a reasonable balancing of competing interests. CBS claims that the changes merely require access-period programs to compete for time to a greater extent, by not fencing out competition to the same degree as before, and that Frank's asserted "first principles" are not the only principles which the Commission should consider.

23. The MCA-Screen Gems petition is similar to MCA's lengthy comments in the proceeding: that the Commission must (as it has

[11] ABC points out that the ban is now total as to 6 half-hours a week, but before covered 7 *hours* as to much feature film. It asserts that the majors have benefitted greatly from the "syndication and financial interest" rules adopted in 1970, and from increased use of movies by the networks (it is stated that 69% of ABC's 1972 expenditures for prime-time programming went to major film companies). It is stated that they also benefit from the recent rule revisions in having somewhat more network time for their pictures and the relaxation of the "off-networks" restrictions as to 7–7:30, permitting them to sell more readily their extensive holdings. ABC makes the same argument advanced last year to the effect that the majors are not really doing badly and some, such as MCA, extremely well. Time-Life argues that UA's request is groundless; and that one day simply is not important enough to make much difference, certainly not with respect to the matter of "network dominance." If the majors are slightly disadvantaged vis-a-vis the networks, this is of little consequence compared to the benefit to independent producers.

done) look at the results of the rule in terms of the general programming flowing from it, including such matters as a great concentration of time on game shows (particularly stripped programs), and increased use of foreign product. These results well justify the reduction represented by the decision. In any event, the reduction is nothing like as much as is claimed; game shows, of high and established popularity, may still be expected to have a prominent place in the 7–7:30 program picture on stations subject to the rule, but maintenance of that period as a "competition-free haven" for such material cannot be justified. It is claimed that what Frank is asking is freedom from having to compete with his fellow independent sources; the new rule itself restricts nothing. MCA–SG also oppose the anti-stripping proposal, particularly as to independents but also as to network affiliates; it is claimed that this acts to curtail the "after-market" for off-network material, particularly important to MCA and other network suppliers because the network production itself usually represents a loss.

24. *The Motion Picture Association statement.* MPAA is an association of 9 producers and distributors of feature-length motion pictures (including MCA-Universal, UA, Columbia Pictures Industries, MGM, Paramount, 20th Century-Fox, and Warner Bros., who have participated in this proceeding). The statement supports the MCA and UA contention that the total ban on feature films is inappropriate and unconstitutional, not related to any legitimate governmental objective and certainly over-broad. The same arguments mentioned above, concerning the effect on far more than the half-hour specifically mentioned, are urged, as is the importance of television to theatrical film production. It is claimed that a great number of independent producers are harmed; of 468 films submitted for rating in 1972, 158 were distributed by MPAA members, but 126 of these were actually produced by independents. A total of 118 pictures were submitted by companies having only one or two features for submission that year. It is asserted that motion pictures are a tremendously important art form, subject to protection like all art forms. Numerous Supreme Court and other decisions are cited.

SANDY FRANK REPLY TO OPPOSITIONS

25. Sandy Frank filed a lengthy reply to the four oppositions to his petition, accompanied by a petition for leave to file a pleading of over 10 pages, which is granted. Initially, it is urged that the opponents of Frank's position are the powerful interests—the networks and the "majors"—not including any non-network station licensees or any other program producers. For the most part, the rest of Frank's reply is devoted to argument with the four opposing parties, to the extent they disagree with, or do not support, its position. As to ABC, Frank expresses distress and incomprehension as to ABC's departure from its earlier position fully supporting the rule; as to NBC, and its argument concerning reliance on the Commission's decision modifying the rule, it is stated that this ignores the dependence by Frank and other independent entities on a continuation of the rule, and that certainty and time are needed by parties of one sort just as by those of another. As to CBS, Frank's chief controversy generally is the alleged failure to answer all of Frank's arguments or to carry arguments to

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their logical conclusion; for example, CBS has opposed Commission involvement in program evaluation but does not oppose a decision based largely on such evaluation, and it refuses to concede that the Commission was arbitrary in modifying the rule even though admitting that it has not had a full and sufficient test. Frank also claims that CBS' reference to the rule as "fencing out competition" ignores the great tendency for stations to clear network programs, which independent producers simply cannot be expected to compete with.

26. With respect to the MCA–SG petition, Frank argues with its characterization of the rule adopted in 1970 as "experimental", with the assessment of the time impact of the modifications, and with use of "programming" as a basis of decision, particularly since this was not one of the objectives of the rule to begin with. It is also claimed that it is effrontery for these parties to talk of the "competition-free haven" created by the rule, when independent producers simply cannot be expected to complete with the pressure to clear network programs or the availability of popular and cheaper off-network material. Frank claims that the opposition to its "anti-stripping" proposal, which would open time to more producers and increase diversity for viewers, is simply designed to preserve the "after-market" for off-network material, without any showing as to why the access period is needed for this. It is also urged that the Commission should rely on the assurances of Frank, Time-Life, etc., as to future programming, and that profits from present successes will be plowed back into more ambitious efforts. In conclusion, it is said that we should not act to continue the dominance of the networks and an endless cycle of off-network reruns, but that we should go back to the pro-competitive basis of the 1970 decision.

DISCUSSION AND CONCLUSIONS

27. Upon careful consideration of the foregoing matters, we are of the view that all three of the foregoing petitions must be denied, and the rule as adopted in our January-February decision (FCC 74–80) affirmed, including retention of the bar against use of feature film during the access periods, but of course not including the "anti-stripping" provision requested by Sandy Frank. Our reasons are set forth in the next several paragraphs, first as to the film company petitions and then as to the Sandy Frank petition.

28. *The MCA and UA petitions.* With respect to the argument that the "total ban" on use of feature film during access periods constitutes an over-broad restraint on freedom of expression, or illegal censorship, we simply do not agree with this argument for a number of reasons. First, we agree with ABC and other parties that this question has been settled, as far as this proceeding is concerned, by the Mount Mansfield decision of 1971 affirming the prime-time access rule (*Mount Mansfield Television, Inc.* v. *FCC*, 442 F. 2d 470, 478 (C.A. 2, 1971)). It is true that the restrictions in the rule adopted and later modified in 1970 did not bar *all* feature film as does the new provision, but, as ABC points out, it applied to a substantially larger amount of time, 7 *hours*

per week as opposed to six half-hours.[12] Therefore we regard the holding in that case as determinative of the issue here. Second, the new rule does not operate to bar feature film from television or from valuable prime time, or sharply to limit its usage. The incidence of movies on television has been quite large for many years, and, in particular, has increased in the last decade as to network carriage of movies during prime time. For the week of April 7–13, 1974, according to *TV Guide*, the 9 stations in Washington, D.C. and Baltimore markets (6 affiliates and 3 independents) showed a total of 118 movies, 8 in the morning, 39 in afternoon or early evening, 33 in prime time, and 38 late evening (after 11 p.m.). Of the 33 prime time movies, 20 were on affiliated stations, 19 being network programs and one a local preemption. Of the 38 late evening movies, 29 were local (8 on affiliates, 21 on independents), and 9 were network. There are independent stations, not subject to the rule, in at least 36 of the top 50 markets for 1974–75, totalling, according to ABC, 83% of the TV homes in the areas of dominant influence of top-50-market stations. Thus, there is no reason to expect a serious curtailment of movie showing on television, either generally or as to prime or late-evening time.

29. As mentioned in the Report and Order (par. 87 and Appendix C), the presentation on large-market affiliated stations of movies during the periods which will be "lost" under the rule changes, 7:30–8 E.T. Monday–Saturday, 10:30–11 Sunday, is currently not great, amounting in November 1973 to some 32 movies a week on 18 stations (three stations "stripping" them 5 or 6 nights a week, one showing them two nights, and 14 on one night). Thus, at most only a fairly small change in practice will result from the modification of the rule. It does not appear that this will be anything like the total "blackout" envisaged by MCA and UA, since a number of stations may be expected to continue their present practice of preempting network programs to show local movies starting at 8 p.m. E.T. or after, and some may present movies ending at 7:30, as ABC's two West Coast stations did Monday–Friday in 1970 before the rule (with the effectiveness of the rule in 1971, they changed to a 6:30–8 schedule).

30. MCA mentions a sharp decline in local prime-time movie presentations by large-market affiliated stations, from 117 to 33 a month. To the extent that this is true in fact (see footnote 13), it does not appear to stem entirely, or chiefly, from restrictions on certain time periods.[13] MCA itself mentions one other factor, the channeling of local and other non-network advertising support into access-period programs as

[12] The 1970 restriction applied to all "cleared" prime time, one hour per night. The rule originally adopted in May 1970 barred from this hour all off-network programs part of a regular series, and feature films which had been previously shown, at any time, by a station in the market. The August 1970 revision modified these provisions to specify off-network programs (without limitation) and feature films shown by a station in the market within the past two years. Because of an ambiguity as to whether a movie shown on a network would be an "off-network program" or a "feature film" for this purpose, a Commission Public Notice of November 1972 stated that, pending decision in Docket 19622, stations might show any movie which had not been presented on a station in the market within the past two years.

[13] MCA's figure of 33 per month appears to be a considerable understatement according to our staff's study of ARB program listings for the October-November 1973 rating period (4 weeks). For example, MCA shows only one for Philadelphia in November 1973, whereas the staff's analysis of ARB data shows 4 (all by the NBC station). According to the staff's study, during this 4-week period affiliated stations in the top-50-markets presented some 190 local movies wholly or partly between the hours of 7 and 11 (E.T. and P.T., or 6–10 C.T. and M.T.). Of these, 76 started on weekdays after 8 p.m. E.T. (or were entirely between 7:30 and 10:30 on Sundays), so that they would not be affected by the rule change. Ninety-two involved time within the Monday-Saturday 7:30 access periods and thus would be precluded by the new rule on their present basis; and another 22 would not be precluded by the new rule as such but might be affected by increased network hours on Sunday or (on one NBC station) early Saturday evening.

a result of the rule, so there is less of it available for prime-time local movies and therefore less incentive to stations to preempt network programs for this purpose. Other factors not mentioned could be the continuing increase in *network* prime-time movie presentations (to which individual stations see no reason to add their own programming efforts), the somewhat lessened number of theatrical feature films produced in at least some recent years, and the fact that a fairly high percentage of the latter are not regarded as suitable for television use, particularly early in the evening (see Report and Order par. 48, concerning the comments of WTIC–TV, Hartford, as to the small amount of "suitable" material, especially of suitable material which has not been on a network before it reaches syndication). These factors, of course, will continue to operate regardless of the changes in the rule recently adopted.

31. Thus, in our judgment, the feature film restriction adopted cannot be viewed as either illegal censorship or a restriction on freedom of expression, or a source of serious impact to the motion-picture production and distribution industry. It is also claimed by these parties, as it was earlier in this and other connections, that the rule change tends to increase network dominance, by making the prime-time showing of feature films take place largely if not entirely through network exhibition. We regard this as too speculative to afford a basis for changing our decision in this respect, for reasons mentioned above including the fact that it does not appear that the claimed "blackout" will materialize. Certainly, this aspect of the matter does not equal in importance the preservation of a substantial number of access periods for new non-network programs designed specifically for television. Our Docket 19622 action cut down the number of "cleared" time periods reserved for such material, and we regard it as important, as to those remaining, to keep them free from the impingement which feature film usage would represent.

32. MCA and UA accuse us of discriminating among programs and types of production activities and entities, barring feature film but encouraging other material, whereas, it is claimed, the producers and distributors in both cases are equally "independent." This argument misses the point. We assume that the "majors" and other motion picture entities are not connected with networks, and here they are regarded as "independent" just as are the producers and syndicators of first-run non-network material. As MPAA points out, many of the producers are fairly small organizations. But—and this is the basis for the distinction—*the material involved here is not specifically produced for, nor does it rely entirely for exposure on, syndicated television sale.* There has not been, so far, "made for TV syndication" feature film. Motion pictures either get exhibition first via theatre showing, and then go to television (either via network or via syndication) or they are "made for television", initially produced for and shown on *network* television. Thus, while we recognize the importance of TV exposure in the economics of much theatrical film production, this medium is not the only, nor generally the first, way these programs reach the public. In this important respect, feature films are different from first-run non-network material, which depends on TV syndication sale to individual stations for its exposure, and, as far as important prime time exposure is concerned, largely on access to the

"cleared" half hours. Thus, the need for making "cleared" time available to the latter material is considerably stronger and more pressing than is the need for time for feature films. The latter, of course, also often have the network route available to them.

33. Therefore, in light of these considerations, we find that the rule must be retained as amended in our recent decision (FCC 74–80), taking into account all of the other opportunities for the presentation of feature film on television—via network, local preemptions during "network" prime time, at other hours, or at any time on independent stations in most of the top 50 markets—the somewhat added flexibility given in this respect by the removal of all restrictions from the 7–7:30 period, and the importance of preserving substantial amounts of time for the development of new non-network material made specifically for television. We reach this conclusion even as to the MCA proposal, which would remove the feature-film bar from one of the "cleared" periods each week, since that could represent a reduction of roughly 20% in the time available for first-run syndicated or local material.[14]

34. *The Sandy Frank petition seeking reversal of changes made.*[15] As discussed at length above, the Frank petition for reconsideration is a broad-gauged attack on our January changes relaxing the rule, particularly in reduction of the time reserved for programming which is neither network nor off-network (first syndicated and local).

35. In evaluating Frank's contentions, two things must be borne in mind. First, as pointed out in paragraph 91 of the Report and Order, the rule is a *restraint*. The Frank petition quarrels with our characterization of it as such (thus assertedly putting it in the same class as the "restraint" resulting from the compulsion to clear network programs); but the Court in the Mount Mansfield decision used the same characterization, although it found the restraints involved in the rule to be justifiable (*Mount Mansfield Television, Inc.* v. *FCC*, 442 U.S. 470, 478), referring to the "very real restraint" which the rule may involve. The restraining effects are obvious: a restraint on the networks in offering more than a certain amount of prime-time programming each week (4 hours less than before); and perhaps more significantly, a restraint on the activities of those producers who prefer to use the network route (such as more than 100 producers who joined as members of the National Committee of Independent Television Producers); a restraint on licensees in their ability to present more network programs if they were available and, of course, on their ability to present off-network programs and, to some extent, feature film (matters where there is generally no network "pressure" such as that assertedly used by the networks to secure clearance of current network programs); and, of course and most important, a restraint on the public's ability to watch programming (some of it quite popular) in these categories and from these sources, during the hours involved.

[14] One possible approach, though not that proposed by MCA, might be to permit feature film to be used in one of the access periods if the station "cleared" an additional half-hour the same week after 8 p.m. so as to compensate. However, this might have a slight impact on the availability of time to new non-network programming (stations could count, toward compliance, a later half-hour which they would clear anyhow), and would not be consistent with the certainty which we found desirable in adopting our rule changes.

[15] Since we conclude below that the Sandy Frank "anti-stripping" proposal should not be adopted, the discussion here assumes the present situation in that respect.

36. The second point is one urged by a number of opponents of the rule in earlier comments—what is sought by entities such as the NAITPD, and now Sandy Frank, is not only "access" or "opportunity" but *exclusive* access and opportunity or, in a sense, "freedom from competition", for programming of certain categories as to origin and auspices, to the exclusion of programming different in these respects. In this connection, TV programming may be divided into five general classes: locally produced by or under the auspices of the station; "produced for syndication"; network programming; former network or "off-network" programs; and feature film. The first two classes remain under the rule (as originally adopted and now) in the position they have always had—no Commission restriction on their access to prime time or any other time. The rule as adopted in 1970 barred, generally, material in the third and fourth classes from 7 hours a week, to preserve it for the first two, particularly the second. The fifth category, feature film, was somewhat restricted by the 1970 rule, although it also gained to some extent from the reduction in use of the third and fourth classes.

37. It is virtually hornbook law that no governmental restraint of this character is legal or appropriate except if and to the extent that it can be justified by a significant public benefit. This is certainly true as to the first point, the restraint, as shown by the cases cited by MCA, UA and MPAA in their filings herein. It appears to be equally true as to the second—exclusivity—if anything approaching an "equal protection of the laws" concept is to be maintained. The significant benefit mentioned need not be immediate, and probably it need not be entirely tangible or quantifiable (e.g., as with multiple-ownership restrictions); but it must be substantial and, if not immediate, probable or quite likely to occur; and it must be *public*.

38. In reaching our decision in Docket 19622, we examined the record of developments under the rule, to see if they justified these restraints and grants of exclusive access fully, and we concluded that they did not. In paragraph 92 of the Report and Order, we pointed out some aspects of the programming which had resulted, chiefly the following: increased "stripping" of material, particularly during the 7:30–8 E.T. period when there had been none before; the greatly increased use of foreign produced material (which can hardly be held to be a favorable result of a rule designed to further *U.S.* independent program production activity); and the concentration on game shows, not so much *as such* as because they are for the most part stripped material or "sixth episodes" (now 6th and 7th episodes in two cases) of material produced for daytime network stripping. We concluded (par. 91): "we do not believe the record is such as to warrant the complete restraint on network and off-network programs which the present rule provides."

Elsewhere in the decision, we called attention to other results which appeared undesirable, including the fact that desirable network children's "specials" had to run after 8 PM as the rule worked out in practice, and the decline of news-documentary or public affairs, and other documentary material in prime time (pars. 83, 101). In light of this record, we concluded that complete retention of the restraints represented by the 1970 rule could not be justified, and we modified it ac-

cordingly, permitting a relatively small increase in network programs generally, another increase in network (or off-network) time if devoted to the types of programs mentioned above, and the removal of all restrictions on the 7–7:30 period, as unwarranted. We adhere to these views.[16]

39. Frank also urges strongly that we should not have made any changes cutting back the amount of "cleared" time in light of our conclusion that the rule had not yet had a full and sufficient test. This is a *misleading interpretation of our decision.* As CBS points out, these statements were made largely in response to arguments of vigorous opponents of the rule, such as MCA and other major film companies, to the effect that the rule had been a dismal failure so far and nothing better could be expected in the future. Our position was stated in paragraph 91 of the Report and Order, where we said:

> In sum, while we do not believe the record is such as to warrant the complete restraint on network and off-network programming which the rule presently provides, we do not believe the rule has had a sufficient test to demonstrate what its future performance will be, so as to warrant further abandonment of it, in view of the benefits accruing * * *.

In paragraph 90 and footnote 38, we mentioned various points urged by opponents as reasons why the future would be no different from the record so far—limited economic potential in syndication, etc.—and expressed the view that these might be long-term factors, but that it had not yet been demonstrated that they would forever be the iron-clad limitations which are claimed. Therefore, bearing in mind the benefits which do flow from the rule in theory and to some extent in practice, it was not appropriate to abandon it to a greater extent. But we also had to assume that these factors may last for a long time, as limitations on developments realistically possible under the rule, and take measures to minimize the loss to the public if this should be true. We reached what we believed to be an appropriate balancing of these considerations, and we are of the same judgment today.

40. It also appears that little significance should be attached to the statements by Mr. Frank concerning his plans (not specifically discussed) for future programming of different types—sports, children's specials, documentaries, etc. As MCA points out, we have been through this before, noting in our August 1970 decision the mid-1970 statements by various producers as to their plans for the future, from which extremely little has in fact developed. If such programming developments do occur, from Frank, Time-Life, or others, the remaining "cleared" half-hours, approximately 15 in number, should provide considerable opportunity for their presentation.

41. As to the three specific changes of which Frank complains, the first is the removal of all restrictions on the first half-hour of prime time, 7–7:30 PM E.T. As to Monday–Friday, this was done because these periods produce singularly little in the way of support for new non-network material, being devoted by 90% of the stations subject to the rule either to news or to stripped game shows most of which were

[16] We also mentioned other matters such as the asserted limited economic potential for non-network as compared to network programs (par. 90 and footnote 38) and the asserted desirability of increasing the number of network programs (par. 96), concluding generally that these were too uncertain, as long-term factors, to warrant a relaxation of the rule beyond that adopted.

on TV, and to some extent in prime time, before the rule. Also, this is a period as to which there is no network pressure to clear time (assertedly a restriction on licensee freedom of decision) because the networks have not programmed this time. This being the case, it appears that the restriction serves little more than as a limitation on licensee freedom of choice in exercising his program responsibility—which Frank emphasizes as one of the main objectives of the rule. The other two changes, as they worked out in practice, represent increases in network programming, up to four hours on Sunday for network programs generally, and additional time on Saturdays for news-documentary, public affairs and children's programs. The general increase permitted represents a view that more opportunity should be given for those program sources which choose to operate through the network, which are deprived to some extent of access opportunity by the rule in its original form, and from which may come programming in the public interest. The second is an effort to get back into prime time certain kinds of programs—children's and documentary-public affairs—which either have tended to disappear from prime time for economic reasons or for which *early* evening hours are particularly important. We thought in reaching our decision that the compromise reached is appropriate, and we adhere to these views.

42. In practice, the cutback in "cleared" time is not as much as Frank believes. As mentioned, the 15 half-hours per market Monday–Friday at 7 contribute very little to the development of really new non-network programming; therefore the appropriate start is not 42 but 27 half-hours. This has been reduced by our rule changes to something in the order of 15, a reduction of about 44%.[17] We have found this reduction to be a reasonable compromise, and still are of that view.

43. Some other points should be noted about Frank's petition. *First*, it appears that Frank would have us attach, to an unwarranted extent, weight to the "first principles" mentioned in paragraph 13, above. These considerations were and are important. But the idea that we should not look further, at the record of the results under the rule, in terms of programming as otherwise, is a narrowly limited viewpoint which we find unacceptable, particularly since what is involved here is not simply access but *exclusive* access, as against other entities whose products may be as meritorious or more so. We have reached a compromise in this respect, preserving considerable opportunity for producers of new non-network programs, and we conclude, as we did before, that it is an appropriate one. *Second*, in Frank's petition, and also

[17] Some parties supporting the original rule, such as NAIPTD, claim that the figure of 15 must be reduced by the amount which licensees will devote to programming of particular local significance, as the Commission expects according to paragraph 88 of the Report and Order. However, that statement did not specify any particular amount, and it was made clear that it applied to programming in any part of prime time and not just the 7:30 periods. Moreover, it appears that not all of Saturday time this coming year, by any means, will be taken by network programs. NBC plans 44 one-hour Saturday programs (mostly news-documentary plus some children's programs); CBS plans 44 Saturday half-hours of children's programs at 7:30; and ABC plans no more than 12 one-hour Saturday programs (6 children's plus up to 6 documentary or public-affairs). These total 156 half-hours, and leave, on Saturdays, 56 half-hours of "cleared" time at 7:30, plus 100 half-hours of time at 7 p.m. which is not restricted by the rule and is available for new material, syndicated or local. Thus, the figure of 15 "cleared" half-hours remaining appears approximately correct.

Frank's analysis also appears to assume that every syndicated program has to be shown in every market to be successful, whereas in fact very few, if any, have been so far. Fifteen "cleared" half-hours a week will accommodate only 15 programs if all have to be shown in all 50 markets; but it would accommodate 18 or 19 if a more realistic average of 40 markets is assumed.

in his reply, there is repeated reference to the fact that, as he sees it, the giant, vested interests gain by our revisions, and the small independent loses. The answer to this is that Commission judgments generally should not be and are not made based on the size of the entity involved on either side (the proponents of the original rule here include two of the largest multiple owners, Westinghouse and Metromedia, as well as Viacom, one of the powerful production and distribution entities). Rather, we have reached a result based on what appears to be the public interest—the interest of the public. Third, it is apparent that some of Frank's contentions cannot even remotely be considered *public*, rather than *private*, considerations. Thus, one of the two particular situations about which he complains in his personal statement is that WXYZ–TV, the ABC-owned station in Detroit, will buy only *one* of the programs he handles, instead of the two which he asserts it would have taken had the rule remained in its earlier form.

44. Mr. Frank also objects to one of our other adjustments in the rule, concerning time-zone differences (see par. 17, hereinabove). Bearing in mind that these events occur no more than 25 times a year for each network, and that the only stations involved are those in the Mountain and Pacific time zones (a total of 9 at most), we do not see reason to upset the rule in this regard, See Report and Order, pars. 108–109. Mr. Frank and also Time-Life in its opposition to other petitions, ask that the changes in the rule, if adhered to, be postponed a year. We recently decided this question on the basis of a petition by NAITPD, and see no reason to alter our decision that the rule amendments should become effective this September, in view of the importance of making desirable changes at a reasonably early date and the speculative nature of the "irreparable injury" allegations. We adhere to our decision in this respect also. See Report and Order, pars. 113–116, and *Memorandum Opinion and Order denying Stay*, FCC 74–221, adopted February 27 and released March 6, 1974.

45. *The Sandy Frank "anti-stripping" proposal.* As mentioned in par. 16 hereinabove, Mr. Frank asks us to adopt an "anti-stripping" or "anti-multiple exposure" rule, under which no station could present during the access period more than one program a week from any single program series. This would bar both "stripping" of game shows or off-network material, and twice-a-week presentation of programs such as *Hollywood Squares* and *Let's Make a Deal*. This, it is claimed, would provide access opportunity for many more independent producers as well as increasing program diversity.

46. This is to a degree an interesting idea, and one which might appeal to numerous persons, without any axe to grind, as one which should be adopted. However, it is a radical departure, and might well be labelled, perhaps properly, as an "elitist" kind of Commission action—telling a viewer he cannot watch his favorite access-period program two or five nights a week, but may view it only once and be content with less appealing fare (perhaps of the same type, perhaps of a different sort) on the other nights. Obviously, this would require substantial exploration before it could be considered for adoption.

47. This concept was not at all set forth in the Notice of Inquiry and Proposed Rule Making herein, and was never advanced in this proceeding until after our January final decision (even its informal sug-

gestion to the Commission, mentioned in the petition, was well after the date for reply comments in March 1973). Therefore, representing as it does a sharp departure, it comes much too late for consideration in our Docket 19622 deliberations. It may be appropriate for exploration at some point in the future.

ORDER

48. In view of the foregoing, IT IS ORDERED, That:

(a) The Petitions for Reconsideration filed in this proceeding on March 18, 1974, by MCA Inc., United Artists Corporation, and Sandy Frank Program Sales, Inc., ARE DENIED;

(b) The Petition for Stay filed herein by United Artists Corporation on March 18, 1974, IS DISMISSED AS MOOT;

(c) The motions of Sandy Frank Program Sales, Inc., for leave to file pleadings of more than the prescribed length, in connection with the petition for reconsideration and in connection with the reply to oppositions, ARE GRANTED; and

(d) This proceeding, Docket 19622, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-351

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of SOUTHERN PACIFIC TRANSPORTATION CO. AND THE SAINT LOUIS SOUTHWESTERN RAILWAY CO. For Waivers of the Requirements of Part 93 of the Commission's Rules and Regulations to permit the leasing of 120 4 KHz Circuits From Each of the Above Applicants on a Not-For Profit, Cost-Sharing Basis to Southern Pacific Communications Co. AND SOUTHERN PACIFIC COMMUNICATIONS CO. For Special Temporary Authorization under Section 214 of the Communications Act of 1934, as Amended, and Section 63.04 of the Commission's Rules To Provide Specialized Communications Common Carrier Services between San Antonio and Dallas, Tex., via Houston, Tex., On The Above Mentioned Leased Circuits Not Beyond August 15, 1974, Pending Completion of Construction of its Own Presently Authorized Permanent Facilities Between Such Cities	File No. P-C-8804

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

(Adopted April 9, 1974; Released April 25, 1974)

BY THE COMMISSION:

1. We have under consideration the January 7, 1974, applications of Southern Pacific Transportation Company (SPTCo.) and its subsidiary, Saint Louis Southwestern Railway Company (Cotton Belt) who are licensees in the Railroad Radio Service and are seeking rule waivers, under Part 93 of our Rules; and the application (File No. P-C-8804), filed by Southern Pacific Communications Company (SPCC) on January 7, 1974, and amended on January 21, 1974 and on April 1, 1974, for special temporary authorization, under Section 214 of the Communications Act of 1934, and Section 63.04 of the Commission's Rules, to provide specialized communications common carrier services between San Antonio and Dallas, Texas, via Houston, Texas, utilizing frequencies assigned to and the facilities of SPTCo.

between San Antonio and Houston, Texas and those of Cotton Belt between Houston and Dallas, Texas, both licensed for use in their private microwave systems, such frequencies and facilities to be temporarily used for the above mentioned common carrier services. The leased facilities are to be obtained by SPCC on a not-for-profit cost-sharing basis. The term of the leasing arrangements would be for a period ending August 15, 1974, unless terminated earlier upon SPCC's completion and activation of service via its own common carrier facilities between those cities.

2. Specifically, SPCC is authorized as a specialized common carrier to provide services between San Francisco, California and East Saint Louis, Illinois, including certain intermediate points. A public need was found by the Commission to exist for these services under earlier authorizations. Certain of its common carrier facilities are in operation such as from San Francisco to Los Angeles, but from Los Angeles, California to Tucson, Arizona, it is operating on facilities temporarily leased from SPTCo. SPCC expects to transfer the services operating between Los Angeles and Tucson from the leased facilities to its own facilities by April 15, 1974.

3. Certain other segments of SPCC's planned facilities are under construction including those between San Antonio and Dallas via Houston and that segment is expected to be completed and operational during the first half of August 1974.

4. SPCC has prospective customers for its proposed facilities between San Antonio and Dallas and such customers desire to obtain services immediately. It believes its economic health would be enhanced if it could advance the provision of services between San Antonio and Dallas by several months.

5. On February 1, 1974, CPI Microwave, Inc. (CPI) filed an opposition to the subject proposal in which it opposed the request for waivers made by SPTCo. and Cotton Belt because it offers service between San Antonio and Dallas in competition to the proposed service of SPCC and does not believe that SPCC should be enabled to commence operation prior to completion of its own facilities. CPI considers that the subject waivers, if granted, would give SPCC an undue competitive advantage over CPI and alleges that SPCC's affiliated companies in the Railroad Radio Service would subsidize the common carrier operation of SPCC. CPI also alleged that the granting of the temporary waivers to SPCC would jeopardize the integrity of the Commission's regulatory efforts as it had earlier granted a temporary waiver to permit SPCC to operate over SPTCo. lines between Los Angeles and Tucson. CPI repeatedly questioned why SPCC did not seek Commission authority for relief under Section 319(d) of the Communications Act to enable it to commence construction and completion of its own microwave radio system earlier than now appears feasible.

6. On February 13, 1974, the Applicants responded to CPI's pleadings of opposition in which they stated that the subject circuits to be leased are idle and available for use and that it is their position that CPI would have the undue competitive advantage if it prevented SPCC from using the idle circuits to begin at an earlier date the services for its prospective customers. The Applicants state that the Commission's Rules should permit flexibility where such waivers are only

for a very limited duration of time. Counter to the allegations of CPI, the applicants reiterated that the operation of SPCC would not be subsidized by the affiliated companies. That the Applicants chose to request waivers of Section 93.2 and Subpart H of Part 93 of the Commission's Rules and Regulations rather than seek relief under Section 319(d) of the Communications Act was said to be rational under the conditions of the situation faced by SPCC and its need to begin services at an earlier date than it could over its own facilities (such discovery being made after construction permits were granted by the Commission).

7. On February 20, 1974, CPI filed a "Supplement to Opposition" enclosing a copy of a SPCC sales brochure wherein it alleges that SPCC anticipated favorable action by the Commission on the instant applications in that it advertised that it would be ready to provide services, which is dependent upon the grant of such applications, in March 1974.

8. On February 21, 1974, the Applicants filed a "Motion to Strike" the "Supplement to Opposition" filed by CPI on the basis of the supplement being neither requested nor authorized by the Commission and thus contravenes the provisions of Section 1.45(c) of our Rules. We agree and CPI's filing is hereby disallowed.

9. CPI is already in operation on the San Antonio-Houston-Dallas route. It appears not to be opposing competition from SPCC, as such, but simply is seeking to delay SPCC's competitive entry. In view of this and the fact that the lease period in question already has declined to no more than four months, we see no reason to delay further SPCC's offering of service to prospective customers.

With the above decision in mind, we will not now limit competition in the subject communication path by delaying the grant of a temporary authorization for SPCC to operate between San Antonio-Houston- and Dallas.

As to CPI's contention that SPCC should not be allowed these leased facilities because it failed to seek a Section 319(d) waiver for early construction of permanent facilities, we find no merit. Moreover, we have in other competitive situations found no public interest bar in permitting a carrier to temporarily lease facilities pending construction of permanent facilities. *See American Satellite Corp.*, 43 FCC 2d 348, and *RCA Global Communications, Inc.*, 42 FCC 2d 774.

10. The applications and arguments of opposition and reply having been carefully considered, we find it to be in the public convenience and necessity for SPCC to commence providing specialized common carrier services via leased facilities between San Antonio and Dallas, Texas, prior to the time possible via its own facilities now under construction in the Domestic Public Point-to-Point Microwave Radio Service.

11. On March 22, 1974, SPCC filed an additional request for Special Temporary Authority until the above captioned applications can be acted upon by the Commission. Because of the temporary nature of the captioned applications and the repetitive nature of the March 22, 1974 filing, it is hereby disallowed. Accordingly, CPI's March 26, 1974 filing in opposition thereto is moot.

12. Accordingly, IT IS ORDERED, That, the provisions of Section 93.2 and pertinent requirements of Subpart H of Part 93 of the Rules ARE WAIVED to permit Southern Pacific Communications Company to lease, on a not-for-profit cost-sharing basis, from Southern Pacific Transportation Company and Saint Louis Southwestern Railway Company, 120 4 KHz circuits on their microwave facilities, authorized in the Railroad Radio Service in Texas between San Antonio and Dallas, via Houston, for the period commencing immediately and terminating upon completion of construction and inauguration of service between such points via SPCC's own microwave radio system on or before August 15, 1974.

13. IT IS FURTHER ORDERED, That Southern Pacific Transportation Company and Saint Louis Southwestern Railway Company SHALL FILE A REPORT with the Commission not later than September 15, 1974, showing the contributions to capital and operating costs made by Southern Pacific Communications Company for the use of their leased facilities, including the dates of commencement and termination and the extent of use of the leased facilities by SPCC.

14. IT IS FURTHER ORDERED, pursuant to the provisions of Section 214 of the Communications Act of 1934, as amended, and Section 63.04 of the Rules, That Southern Pacific Communications Company's request for special temporary authorization to lease and operate circuits for specialized communications common carrier services between San Antonio and Dallas, Texas, IS GRANTED, for the period commencing immediately and terminating upon completion of construction and inauguration of service between such points via SPCC's own microwave radio system on or before August 15, 1974.

15. IT IS FURTHER ORDERED, That the opposition of CPI IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*

FCC 74-266

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
TELEPROMPTER GULF COAST CATV CORP.:	
LARGO, FLA.	CAC-2448; FL047
BELLEAIR BLUFFS, FLA.	CAC-2449; FL046
BELLEAIR BEACH, FLA.	CAC-2450; FL049
INDIAN ROCKS BEACH, FLA.	CAC-2451; FL044
SEMINOLE, FLA.	CAC-2452; FL048
SAFETY HARBOR, FLA.	CAC-2453; FL233
INDIAN ROCKS BEACH-SOUTH SHORE, FLA.	CAC-2454; FL168
BELLEAIR SHORES, FLA.	CAC-2455; FL271
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted March 13, 1974; Released March 21, 1974)

BY THE COMMISSION:

1. TelePrompTer Gulf Coast CATV Corporation operates cable television systems at the above-captioned communities, all of which are located within the specified zone of the Tampa-St. Petersburg, Florida, major television market (#28). These systems provide subscribers with the following television broadcast stations: [1]

Florida:
WEDU (Educational, channel 3), Tampa.
WTOG (Independent, channel 44), St. Petersburg.
WFLA-TV (NBC, channel 8), Tampa.
WLCY-TV (ABC, channel 10), Tampa.
WUSF-TV (Educational, channel 16), Tampa.
WTVT (CBS, channel 13), Tampa.

2. On May 1, 1973, TelePrompTer filed applications for certificates of compliance to add the signals of the following television broadcast stations:

Georgia: WTCG (Independent, channel 17), Atlanta.
Florida:
WSWB-TV [2] (Independent, channel 35), Orlando.
WLTV (Spanish language, channel 23), Miami.

All of TelePrompTer's applications are unopposed. Carriage of these signals is consistent with Section 76.61 of the Commission's Rules. Section 76.251(c) of the Rules, however, requires a major market cable television system operating prior to March 31, 1972, to add one

[1] The cable systems have a 12-channel capacity for carriage of broadcast and access services. Of these channels, nine will be used for television signal carriage. Expansion to 24-channel capacity is planned.

[2] At the present time, WSWB-TV is a construction permittee. Its signal will be carried when it becomes operational.

access channel for each new distant signal that it plans to carry. Thus, where eight systems propose to add two distant independent signals, as is the case here, a total of sixteen access channels would have to be provided—one public and one educational access channel per system. However, TelePrompTer proposes to provide two access channels to be shared among the eight communities. Although TelePrompTer did not specifically request a waiver of Section 76.251(c), we will treat its proposal as such a request.

3. The eight communities involved are served by a common headend facility, are geographically contiguous, and, TelePrompTer argues, have common economic, political, and social interests. TelePrompTer contends that because of the size of the communities involved,[3] requiring separate access channels for each community will create a cable-casting capacity far beyond the needs of the area and will result in many of the access channels not being used. TelePrompTer further maintains that the needs of all racial and ethnic minorities in the area can adequately be met through the use of the two access channels proposed.

4. The sharing of access channels under these circumstances was specifically envisioned in the *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 359 (1972), and we have, in the past, permitted the practice upon proper showing. *See, e.g., Coldwater Cablevision, Inc.*, FCC 73–281, 40 FCC 2d 58 (1973); *Halifax Cable TV, Inc.*, FCC 73–679, 41 FCC 2d 887 (1973). In this case, the Commission believes that TelePrompTer has made a proper showing, and accordingly, we will allow the proposed access plan.

In view of the foregoing, the Commission finds that a grant of the subject applications and partial waiver of Section 76.251(c) would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the applications for certificates of compliance (CAC–2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455), filed by TelePrompTer Gulf Coast CATV Corporation, ARE GRANTED, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

[3] TelePrompTer states the population figures for the various communities as: Largo, 22,031; Belleair Bluffs, 1,910; Belleair Beach, 952; Indian Rocks Beach, 2,666; Seminole, 2,410; Safety Harbor, 3,103; Indian Rocks Beach-South Shore, 791; Belleair Shore, 124; total 33,987.

FCC 74-355

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
TELEVISION CABLE CO., INC., MYRTLE BEACH, S.C.	CSR-258 SC025
TELEVISION CABLE CO., INC., CONWAY, S.C.	CSR-259 SC023
Request for Waiver of Section 76.91 of the Commission's Rules	

MEMORANDUM OPINION AND ORDER

(Adopted April 9, 1974; Released April 23, 1974)

BY THE COMMISSION:

1. On September 7, 1972, Television Cable Company, Inc., operator of cable television systems at Myrtle Beach and Conway, South Carolina, filed two "Petition[s] for Waiver" of Section 76.91 of the Commission's Rules,[1] in an effort to avoid furnishing network program exclusivity to Television Broadcast Station WWAY, Wilmington, North Carolina. On October 5, 1972, State Telecasting Company, Inc., licensee of Station WCBD-TV, Charleston, South Carolina, filed a "Statement" urging a grant of the waivers. And on October 6, 1972, Clay Broadcasting Corporation, licensee of Station WWAY filed two "Opposition[s] to Petition[s] for Waiver."

2. Television Cable operates twelve channel cable television systems at Myrtle Beach and Conway, and provides the following television signals:

North Carolina:
- WWAY (ABC), Wilmington.
- WECT (NBC), Wilmington.

South Carolina:
- WCBD-TV (ABC), Charleston.
- WBTW (ABC, CBS), Florence.
- WCSC-TV (CBS), Charleston.
- WIS-TV (NBC), Columbia.
- WJPM-TV (Educational), Florence.

At its Myrtle Beach system, Television Cable also carries Television Broadcast Stations WCIV (NBC), Charleston, South Carolina and WSOC-TV (NBC), Charlotte, North Carolina. Of the three ABC

[1] Section 76.91 states in pertinent part:
"(a) Any cable television system operating in a community, in whole or in part, within the Grade B contour of any television broadcast station, or within the community of a 100-watt or higher power television translator station, and that carries the signal of such station shall, on request of the station licensee or permittee, maintain the station's exclusivity as an outlet for network programming against lower priority duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in §§ 76.93 and 76.95.
"(b) For purposes of this section, the order of priority of television signals carried by a cable television system is as follows: (3) Third, all television broadcast stations within whose Grade B contours the community of the system is located, in whole or in part."

affiliates carried by Television Cable only Station WWAY places a predicted Grade B or better contour over Myrtle Beach and Conway.

3. Television Cable argues that it should not be required to afford WWAY exclusivity on the grounds that it has carried WCBD–TV and WBTW for more than ten years, that our cable television policies favor providing cable subscribers with in-state stations, that Myrtle Beach and Conway residents share no community of interest with Wilmington because it is 65 miles away and in another state, that extending exclusivity protection to a Wilmington station will harm Myrtle Beach's competition for tourist business, that WCBD–TV provides programs of local interest to subscribers, that power failures from electrical storms will disrupt automatic switching devices, and that WWAY sometimes goes dark because of technical problems. Television Cable also maintains that the expense of exclusivity protection may require a cutback in origination programming at Myrtle Beach. Finally, it requests that if the waiver is denied, we grant a temporary waiver pending our final consideration of Station WCBD–TV and WBTW's applications for construction permits to expand their predicted Grade B contours to encompass the subject communities.

4. We reject Television Cable's arguments for the following reasons. First, Television Cable has failed to show any injury resulting from WWAY's delayed request for exclusivity protection. Moreover, community-orientation, economic competition and relative distances of stations never have been controlling as to exclusivity protection, *Second Report and Order*, FCC 66–220, 2 FCC 2d 725. And Television Cable need not delete any WCBD–TV or WBTW local, non-network programming, or even delay their non-network programming. Television Cable has failed to document its assertion that electrical storms may disrupt automatic switching and that WWAY provides a low-quality signal. Its claim that exclusivity protection may reduce origination programming at Myrtle Beach is merely speculative.

5. We also deny Television Cable's request for a temporary waiver. Both WBTW's and WCBD–TV's attempts to expand their predicted Grade B contours still hang in legal limbo. On August 27, 1969, we designated a hearing on WBTW's application for a construction permit, *Daily Telegraph Printing Co.*, FCC 69–943, 19 FCC 2d 247. On May 18, 1973, we denied WCBD–TV's request for review of the Review Board's denial of a construction permit, *South Carolina Educational Television Commission*, FCC 73–508, appeal pending *sub nom. South Carolina Educational Television Commission* v. *Federal Communications Commission* (Civ. No. 73–1679, D.C. Cir.). Our rules are designed to deal with existing television stations, see *Cedar Rapids Television Co.* v. *Federal Communications Commission*, 387 F. 2d 228 (D.C. Cir., 1967), and we see no reason to grant a waiver on the speculation that coverage patterns may vary in the future.

In view of the foregoing, we find that grant of the requested waiver of Section 76.91 of the Rules would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition[s] for Waiver" filed September 7, 1972, by Television Cable Company, Inc., ARE DENIED.

IT IS FURTHER ORDERED, That Television Cable Company, Inc., IS DIRECTED to comply with the requirements of Section 76.91 of the Commission's Rules on its cable television systems at Conway and Myrtle Beach, South Carolina, within thirty (30) days of the release date of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-463

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of TRT TELECOMMUNICATIONS CORP. Application for Authorization, Pursuant to Section 214 of the Communications Act of 1934, to Acquire and Operate Facilities To Provide Direct Service Between the United States and the United Kingdom and Points Beyond	File No. T-C-2335-3

MEMORANDUM OPINION, ORDER, AUTHORIZATION, AND CERTIFICATE

(Adopted May 1, 1974; Released May 7, 1974)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN, HOOKS AND REID CONCURRING IN THE RESULT, ACTING AS A BOARD. COMMISSIONER QUELLO NOT PARTICIPATING.

1. The Commission is herein considering:

(a) An application (File No. T-C-2335-3) filed by TRT Telecommunications Corporation (TRT) on May 7, 1973, for authorization, pursuant to Section 214 of the Communications Act of 1934, to

(1) acquire and operate three voice-grade half circuits (one to be subdivided into as many as 24 telegraph grade channels) between an appropriate earth station on the East Coast of the United States and an appropriate satellite over the Atlantic Ocean, to be interconnected with matching circuits furnished by the British Post Office (BPO) in the United Kingdom (UK);

(2) acquire and operate three voice-grade circuits between TRT's operating center in Fort Lauderdale, Florida and the U.S. earth station; and

(3) use the facilities requested to provide those services which TRT is authorized to provide, including telex, message telegraph, and leased telegraph channel services via the subdivided circuit, and leased voice channel services (including voice-equipped-for-data and/or alternate voice-data) via the remaining two circuits;

(b) Petitions to reject or deny the application filed by ITT World Communications Inc. (ITTWC) (June 14, 1973), RCA Global Communications, Inc. (RCAGC) (June 15, 1973) and Western Union International, Inc. (WUI) (June 27, 1973); and

(c) An opposition to the ITTWC, RCAGC and WUI petitions filed July 16, 1973 by TRT and replies to such opposition filed by RCAGC (July 30, 1973), WUI (July 31, 1973) and ITTWC (August 2, 1973).

2. This application was listed in the Commission's Public Notice of Applications Accepted for Filing on May 21, 1973. Copies thereof, together with notices extending the opportunity to file comments, were

mailed to interested parties, including those required by statute to be served. Comments were received from ITTWC, RCAGC and WUI.

THE APPLICATION

3. In its application TRT asserts that it presently provides indirect telex and message service between the US and UK via interconnection with ITALCABLE in Rome, Italy, pursuant to authority granted by the Commission in its July 19, 1972 Order authorizing TRT to initiate direct service between the United States and Italy.[1] The facilities requested herein would allow TRT to provide direct US–UK service. TRT represents that the public need for acquisition and operation of the requested direct facilities is evidenced in applicable findings made in the Commission's *Italy Order*. According to TRT, such findings include the following:

(a) The authorization of European operations for TRT via its Miami gateway would serve to alleviate existing congestion in Western Union Telegraph Company's (WU) New York telex exchange (handling hinterland access to and from international record carrier (IRC) gateway operations);

(b) since Miami and New Orleans are major international air and shipping gateways, implementation of direct communications access from those points would provide significant customer benefit; and

(c) TRT's traditional Central American markets have been diminished by increased competition from other international carriers and by displacement from certain of its foreign operations due to nationalistic pressures.

TRT argues that these considerations support the proposition that "only by acquiring additional direct circuits to new European points can TRT and its customers realize the full benefits described in the Commission's decision."[2]

4. Moreover, TRT argues, in the absence of direct access to the UK and consequent continued reliance on indirect routing via Italy, there has not been a full realization of the growth potential in TRT's US–UK telex business. According to TRT, implementation of one voice-grade half circuit subdivided into telegraph-grade channels would, during the first year of operation, satisfy demand for telex and message telegraph services and improve the quality of service to the UK by eliminating the high rate of incomplete calls currently experienced under the indirect routing. With regard to leased voice channel business, TRT indicates that it handles no such service at present but that implementation of the requested circuits for that purpose would allow TRT to compete more effectively for voice-grade leases between the US and UK.

5. TRT lists its projected overall direct costs for the requested facilities as follows:

[1] Memorandum Opinion, Order, Authorization and Certificate, released July 19, 1972, 35 FCC 2d 950, hereinafter *Italy Order*.
[2] TRT Application, May 7, 1973, p. 7.

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(a) Three voice-grade circuits leased from AT&T—$5,976/circuit/year (Ft. Lauderdale, Florida to Etam, West Virginia) or $8,424/circuit/year (Ft. Lauderdale to Andover, Maine);

(b) Three satellite voice-grade half circuits leased from Comsat—$34,200/circuit/year;

(c) annual depreciation of new multiplex equipment required for the subdivided circuit—$2,040;

(d) annual depreciation of new equipment required for each circuit to be used for AVD service—$200;

(e) annual operation and maintenance of subdivided circuit—$4,600; and

(f) annual operation and maintenance of each circuit to be used for AVD service—$750.[3]

6. TRT represents that tariff charges for the proposed telex service will be those contained in its tariffs now on file at the Commission; charges for leased channel services will be identical to those presently made by the other US carriers serving the UK, or the same as the carrier that now takes the lowest charges for the service.[4]

7. With regard to revenues, TRT expects that those derived from US/UK telex and telegraph leased channel (excluding, therefore, message telegraph) should total in excess of $146,788. In support, TRT asserts that, "based upon TRT's impressive growth in US-to-UK telex, despite serving the UK via only an indirect routing, TRT conservatively estimates that if it were to have initiated direct service to the UK on April 1, 1972, it would be increasing its telex traffic to the UK by an average of at least 10% per month during the remainder of the calendar year 1973." [5] Accordingly, TRT would project 80,000 minutes in traffic for 1973 (yielding $88,000 after payouts), supplemented by an initial impulse jump, and would presumably apply this as a 1974 projection. According to TRT, additional telex revenues would be derived by routing transit traffic destined to the UK over the requested direct circuit; rerouting would reduce the amounts of payouts to correspondent carriers, stimulate increased traffic flows with the offer of a more direct routing, and yield minimum annual revenues after payouts of approximately $32,148 (based on four-month figures for October 1972–January 1973). In addition TRT represents that it has three firm customers for US–UK leased telegraph channel service that should generate $26,640 per year. Furthermore, TRT projects a favorable balance of incremental cost and revenue in the proposed leased voice channel services based on its understanding from BPO figures that there has been approximately a 250% increase in the number of such channels in the last four years, and that such growth is expected to continue.

8. TRT argues that, given the size of the US–UK market and the substantial growth in telex traffic over the last few years, the revenues TRT would derive from telex via the requested direct circuit would

[3] A detailed breakdown of total direct costs associated with depreciation, operation, and maintenance of these facilities by service categories is provided in Attachment 1 to TRT's November 6, 1973 submission of additional information.

[4] On November 6, 1973, TRT filed, as supplemental information, its proposed tariffs for leased channel and UK origin message services; it also indicated that its existing tariffs, FCC No. 60 and FCC No. 64, would cover the proposed direct US/UK message and direct US/UK telex service, respectively.

[5] Application, p. 10.

not reduce the existing revenues of RCAGC, WUI or ITTWC. In addition, TRT anticipates that the revenues generated by leased telegraph or voice channel business would not impair the other carriers' present return.

9. TRT has filed with the Commission a proposed operating agreement with its correspondent in the UK, the British Post Office. BPO agrees to receive US origin to UK telex; but due to "operational difficulties in distribution of UK–US telex and TWX between the US international record carriers" it could not agree at this time to provide a proportionate return on the UK–US telex traffic.[6] Apparently, BPO would also be unable to operate any direct telegraph service with TRT until a planned VFT (voice frequency telegraph) system becomes fully operational; according to TRT this is expected in 1974. The accounting rate applicable for the exchange of telex is $2.25/minute, divided equally; for message telegraph it is $0.74 per ordinary word. Finally, BPO has agreed to interconnect its facilities with those of TRT for the provision of all existing types of non-voice leased channel services (including AVD) charging the same amount for its half circuits to the US whether the US portions are provided by TRT or any other IRC. In addition, BPO will be prepared to accept telex traffic from TRT for points beyond the UK, subject to the agreement of the receiving administrations.

Pleadings

10. Objections to TRT's application raised by ITTWC, WUI and RCAGC, may be summarized as follows:

(a) TRT's proposed participation in the US/UK market as a fifth record carrier[7] raises significant questions regarding the severity of market fragmentation and economic impact. An authorization of TRT's proposal would represent more than a minor or piecemeal entrance into the European market (as the Commission has treated TRT's earlier applications for authority to serve Italy on a direct basis) since traffic to and from the UK represents approximately ⅓ of the total US/Europe telecommunications business. A central issue, therefore, is really one of basic policy—whether a fifth record carrier should be permitted to serve Europe generally. Accordingly, TRT's application should be the subject of an evidentiary hearing so that TRT's traffic and revenue/cost figures[8] as well as its market analysis and assertion of need for the proposed facilities[9] may be tested in light of general consid-

[6] In its November 6, 1973 filing TRT explains that until new equipment becomes available BPO is only equipped to route telex and TWX to WU subscribers in the US via the three existing carriers. With respect to return telex traffic for TRT gateway subscribers, BPO will apparently endeavor to accommodate TRT, but can give it no assurance before new equipment becomes available.

[7] At present, record service between the US and UK is provided by ITTWC, RCAGC, WUI, and the French Cable Company.

[8] ITTWC would challenge TRT's revenue and cost projections, pointing out the "curious" coincidence that TRT's first year projection of telex traffic to UK—80,000 minutes—is identical to a first-year telex projection offered in its recent application for a circuit to Puerto Rico. See Memorandum Opinion, Order, Authorization and Certificate, released April 26, 1973.

[9] ITTWC would also argue that while the competitive problems TRT is experiencing in its traditional Caribbean and Latin American markets may be a reason for seeking authority to provide direct service to UK, it "is hardly a reason why the existing facilities of carriers [between US and UK] are inadequate."

erations of the feasibility of additional competition.[10] The issue is further complicated, it is argued, by the fact that the US/Europe market is already threatened by the potential entry of AT&T into the international switched data field.[11]

(b) TRT's entry into the US/UK message telegraph market would divert business from the already-diminishing traffic base of existing carriers and, according to WUI, "total U.S. carrier revenues would decline to the extent that TRT would share tolls with B.P.O. for messages formerly handled terminal-to-terminal by WUI and ITTWC."[12] ITTWC highlights the projected diversion problem: While TRT proposes to handle only routed message traffic, every routed message which TRT carries must come, either from traffic presently routed to other carriers, or from the pool of messages which were previously unrouted. The effect, therefore, of permitting TRT to furnish routed traffic to the UK is to directly reduce ITTWC's message revenue, since it cannot, because of WUI's cumulative quota shortfall position, receive any portion of the unrouted UK traffic.[13]

(c) ITTWC and RCAGC have applied for authority to extend operations to additional gateway cities, including Miami and New Orleans. These filings and related gateway expansion policy issues are currently pending in the Commission's Inquiry in Docket No. 19660. ITTWC and RCAGC may ultimately receive authority to establish gateways in Miami and New Orleans, and a grant of TRT's instant proposal prior to that time would, according to ITTWC, prejudice ITTWC's ability to make such new gateway operations viable.[14] WUI argues that TRT would gain an unwarranted tariff advantage over WUI because it would be cheaper for leased channel customers and more convenient for overseas telex customers located in the hinterland (closer to Miami or New Orleans than to New York or Washington, D.C.) to select TRT over WUI.

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[10] Support for the proposition that TRT's application involves a basic policy question (the Restructuring of the Market), requiring a hearing, is allegedly found in the following:
1. The instant application can be distinguished from the Commission's *Italy Order*. In its reconsideration of that *Order*, the Commission said that "in determining what the effects would be of TRT's limited direct entry into a portion of the European market, we did not consider it necessary to evaluate the effects of TRT's possible long-term growth in Europe as a whole" and "the adverse effects on the other record carriers will be *de minimis*. Memorandum Opinion and Order, released May 25, 1973, 40 FCC 2d 1168, hereinafter *Italy reconsideration*.
2. In its TAT–6 decision, the Commission rejected TRT's bid for 90 circuits on the ground that there was insufficient information supplied to decide "the basic policy issue of whether [TRT] should be permitted to enter into this area generally [i.e., Europe] as a fourth competing carrier." Memorandum Opinion, Order and Authorization, released July 12, 1972, 35 FCC 2d 801.
3. In its recent decision rejecting "direct access" tariffs, the Commission gave indication that a major restructuring of the industry (and associated economic impact) could not be allowed by the simple expedient of filing a tariff. See Notice of Inquiry and Proposed Rule Making, Docket 19660, released December 18, 1972.

[11] See Notice of Inquiry, Docket 19558, released July 31, 1972.

[12] WUI Petition to Deny, June 27, 1973, p. 3.

[13] ITTWC notes that the cumulative shortfall problem, arising from the provision in the International Formula that a carrier entitled to a quota of unrouted message traffic, receiving more traffic than that which combined with the unrouted would yield more than its base year market share as a whole, must surrender to other carriers serving the geographical subarea an amount of messages to balance the excess, is the primary reason for the existence of inequities about which ITTWC has complained and which are under consideration in the Commission Notice of Inquiry and Proposed Rule Making in Docket No. 19660.

[14] ITTWC cites language used in the Commission's *Puerto Rico Order* as support for the proposition that *Ashbacker* considerations are applicable to the instant matter.

(d) Direct operations between the US and UK will not result in a more favorable division of tolls and an increase in TRT's revenue over that which it would receive if the traffic were continued to be handled via existing facilities through Italy. Under existing division of tolls arrangements, the standard $2.25 settlement rate on telex calls Canada-US/Western Europe is divided equally regardless of which transatlantic route is employed. Furthermore, there is no illustration that the grade of service TRT is now receiving from ITALCABLE is inferior in speed or quality nor is there an indication of how a direct routing would improve the situation. Thus, there is no basis for projecting increased revenues from improved service.

(e) The division of tolls with BPO agreed to by TRT, for message telegraph traffic, essentially enables BPO to whipsaw the US carriers by playing one against the other. This agreement was made despite the fact that the US carriers' divisions are a matter of record and TRT is familiar with the Commission policy that divisions of tolls on parallel rates are to be the same. According to RCAGC, the cost to it of accepting the division agreed to by TRT would be at least $75,000 per year.

(f) TRT has no present authority to provide AVD service to Europe and has not justified its proposal to do so.[15]

TRT'S OPPOSITION

11. TRT has opposed the petitions of ITTWC, WUI and RCAGC on the following grounds:

(a) An evidentiary hearing is not warranted. This application is not for authority to provide direct service to European points generally. TRT's prior application for US-Italy-Europe service was actually more significant in terms of penetrating the European market and ". . . the fact that the Commission rejected a similar contention for a hearing in granting TRT's US-Italy-Europe application should be dispositive of this issue." [16] In addition, consideration of this application should not be affected by the possible participation of AT&T in the switched data field; the Commission has already deferred such concern for consideration in the pending Inquiry on overseas dataphone.[17]

(b) While ITTWC and WUI express concern over the projected diversion of substantial traffic from them as a result of TRT's providing direct rather than indirect service, neither has disputed TRT's showing that its total projected annual revenues for all services involved represent only a small fraction of the annual growth in revenues available to the US IRC's from just US-UK telex service.[18]

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[15] RCAGC points out that, in fact, pursuant to Commission Order released May 25, 1973, denying an RCAGC petition for reconsideration of the TRT Italy authorization TRT's authority to provide AVD service was specifically withdrawn.

[16] TRT Opposition, July 16, 1973, p. 5.

[17] See *Italy Reconsideration*, p. 1177.

[18] TRT further challenges WUI's position on the market's ability to accommodate another carrier by citing the US-Nicaragua case involving a significantly smaller market than US-UK, where WUI applied for and was recently granted authority to participate as a fourth carrier.

(c) Regarding the International Formula questions raised by ITTWC, TRT cites Commission language in the *Italy Reconsideration* to the effect that, while TRT's entry may affect the amount of unrouted traffic available for distribution to carriers eligible for a quota, it would not affect the overall proportionate distribution of traffic among those carriers. In that order the Commission found that resolution of the Formula question was not relevant to the application at hand; TRT argues it is also not relevant in the instant matter.[19]

(d) According to TRT, it is unreasonable to argue that TRT would gain an unfair advantage in implementing expanded operations out of its Miami and New Orleans gateways because of its unique status there, in light of TRT's exclusion from the more lucrative gateways of its competitors. Moreover, the Commission has already addressed itself in the *Italy Reconsideration* to the proposition that additional operating authority to TRT should be deferred pending disposition of IRC applications for additional gateways. The Commission rejected the argument and distinguished TRT's pending application to expand service from existing gateways from the IRC's proposals to enter new gateways and cited its Notice of Inquiry and Proposed Rule Making in Docket No. 19660 where full consideration of the latter would be undertaken.[20]

(e) According to TRT, RCAGC fallaciously assumes that TRT's revenue retentions (after payouts to WU) from U.S.-UK telex traffic would be the same whether the traffic is routed via Italy or directly. "While TRT would pay the British Post Office (BPO) $1.125 whether the telex traffic is routed directly or indirectly, if the telex traffic is routed via Italy, TRT, besides paying BPO $1.125, must pay ITALCABLE an additional $.5625. Thus based solely on the transfer of 80,000 US to UK telex minutes from an indirect routing via Italy to a direct routing, TRT would retain $45,000 in additional revenues . . ." [21]

(f) According to TRT, RCAGC's assertion that a fully-allocated cost analysis should be made with respect to the instant application is without foundation. Section 63.01(m) of the Commission's Rules requires data on estimated *added* revenues and costs of the circuit acquisition and operation, thus contemplating an incremental cost approach.[22]

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[19] See *Italy Reconsideration*, p. 1179.

[20] See *Italy Reconsideration*, p. 1179.

[21] TRT opposition, p. 7. TRT rejects the contention that its estimate of 80,000 minutes is suspect and refers to the methodology used in deriving the figure at p. 9–11.

[22] On the question of added revenues TRT offers additional detail as to the basis for its projections, as follows:

(1) A minimum of a 20% increase in TRT telex traffic is expected as an "initial jump", generating an additional 16,000 telex minutes (presumably over and above the 80,000 minute figure cited in the application). Using RCAGC's suggested figure for payouts to WU per minute, $0.475 (allowing for uncompleted calls, time delays, etc.) additional revenues of $15,200 would be generated from the new traffic. (TRT expects the payout to WU to be close to $0.317 since direct routing will reduce unpaid holding times with WU subscribers.)

(2) TRT's estimate of $32,148 in annual revenues from transit telex traffic to the UK (exclusive of Panama originating traffic) was based upon historical data showing TRT was deriving $2,679 monthly from 2,261 minutes per month. RCAGC, in challenging this, apparently (according to TRT) overlooked the fact that TRT retains more than in the normal situation where such transit traffic must be passed to a domestic entity. TRT

(g) "Route strengthening" for a weaker carrier such as TRT is a strong public interest consideration that independently supports the grant of TRT's application for direct circuit operations to UK. The Civil Aeronautics Board (CAB), TRT notes, has held, with respect to its carriers, that strengthening the smaller and weaker carriers, fostering a sound balance of competitive opportunities (though not necessarily making all carriers equal in size or profitability), "is a 'weighty and material' factor on the scale of public convenience and necessity."[23] TRT also notes that it incurred a net loss from its regulated operations in 1972 and that improved operating authority would enhance its profitability and thus benefit customers who rely on its continued viability.

(h) With respect to RCAGC's "whipsaw" argument, TRT argues that since it would participate in a relatively minuscule percentage of the total message telegraph traffic between the US and UK, the TRT/BPO division of tolls arrangement for the proposed direct operations could hardly be used as a lever by BPO to force other IRC's to agree to a less favorable division of tolls than currently operative.[24]

(i) With respect to TRT's provision of leased voice channel service, TRT cites the "compelling justification" set out in its application and argues that it would be unprecedented to deny such authority while permitting initiation of telex and message telegraph on a direct basis. In addition, TRT notes that the Commission's rationale for withdrawal of leased voice channel authority with respect to Italy—that TRT had not asked for it—is not supportive of RCAGC's position.

12. Additional arguments raised by ITTWC, WUI and RCAGC in their reply pleadings include the following:

(a) Serious public interest questions are raised by the apparent *modus operandi* employed by TRT to implement its long range plans to restructure the record industry. TRT's refutation of the notion that revenue retentions from US to UK telex traffic should be the same under indirect or direct routing (arguing that, while a payment of $1.125/word to BPO would be required in either case, under indirect routing an additional $.5625/word to ITAL CABLE is required) indicates that TRT may have had an arrangement with ITALCABLE for the handling of transit telex traffic involving payouts by TRT which exceeded those normally made by other carriers. RCAGC argues that this runs contrary to

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explains that this results from the fact that TRT provides telex service in Honduras. If, however, RCAGC's suggested $0.27 in additional per minute revenue were applied, there would still be generated according to TRT, an additional $7,300.00 in revenues from the transiting traffic.

(3) Using RCAGC's approach to calculating additional revenues the total would be $67,500 telex service alone, or, in excess of 50% of the *total* additional cost associated with providing telex, message telegraph, and leased telegraph channel services.

As to added costs, TRT explains that the difference in the stated cost for multiplex equipment in the Puerto Rico application and the instant one is due to the installation of TDM equipment for the Puerto Rico circuit, requiring installation of a completely redundant system at Ft. Lauderdale.

[23] *Transpacific Route Investigation*, CAB Docket No. 16242, 1969.

[24] TRT represents in its November 5, 1973 filing that it agreed to the subject divisions, offered by BPO, with the understanding that pursuant to Art. 8, paragraph 24 of the ITU Telegraph Regulations (1973), the foreign correspondent is free to set its own terminal charges. In addition, TRT has compared other existing divisions of tolls arrangements of the IRC's in the UK and found them to be varied.

a Commission policy regarding divisions for comparable services on parallel routes. It appears from the dealings of TRT with ITALCABLE (as well as recent "cut rate" tariff offerings to the US government) that it has adopted a policy of dealing-at-any-cost with a foreign entity and using the agreement as a basis for obtaining Commission authority to serve the entity's area. The philosophy is most recently apparent in TRT's operating agreement with BPO.

(b) TRT's resort to the aviation law doctrine of "route strengthening" is not appropriate. The CAB decision cited came after a full hearing on issues presumably including immediate and future encroachment upon existing route traffic and all interested carrier applications were considered simultaneously. Here, TRT would propose that the Commission judge the market impact of TRT's proposal on the basis of speculation rather than hearing and that it consider the other carriers' applications for new gateway authority in Miami and New Orleans independently of TRT's UK application. Even if the route strengthening concept were applied here, it appears that instead of strengthening TRT, the UK operation would weaken TRT while at the same time making it more costly for other US international record carriers to provide service.

DISCUSSION

13. Of primary concern in this matter is a determination as to whether competition in the US/UK market would be reasonably feasible should TRT be permitted to enter as a fifth US competitor and, if so, whether there is a reasonable expectation that such competition would serve the public interest. Applying the standard of the US Supreme Court's decision in *Federal Communications Commission* v. *RCA Global Communications, Inc.* (346 US 86, 1953) and as stated in *MacKay Radio and Telegraph Co.* (28 FCC 231, 1960), "feasibility of competition depends on whether there is sufficient traffic to support the addition of another competing direct circuit and upon the effect of the opening of such circuit upon the applicant as well as all other carriers providing service to the public." [25]

14. A review of traffic data submitted by the US IRC's pursuant to Section 43.61 of the Commission's Rules indicates that in the period 1969–1972 message telegraph volume between the US and the UK has decreased to a certain extent, but telex volume (in minutes) has increased at an average annual rate of 27.7%. Telex revenues of the existing major US carriers (RCAGC, ITTWC, and WUI) have grown at an average rate of 24.6% per year. Figures for 1972 show total US–UK telex revenues (after payouts) of $4,971,064 to RCAGC, $5,180,338 to WUI, and $5,883,371 to ITTWC. Total industry telex revenues for 1972 were $16,058,083. While message telegraph revenues are expected to decline at approximately 3% per year through 1975, telex business will continue to grow at a significant rate. Accordingly, industry US–UK telex revenues for 1973 might well reach $20 million and, for 1974, $24,400,000 (22% increase over 1973).

[25] 28 FCC 231, 239.

15. For the purpose of judging feasibility of (added) competition in this market, or continued viability and reasonable profitability of competing carriers, we must consider the reliability of TRT's projected annual revenues and the impact or drain on revenues of other carriers. TRT projects revenues in excess of $146,788 derived from telex and leased telegraph channel services in the first year of operation. First, it expects to serve three firm leased telegraph channel customers, yielding $26,640; second, it projects in excess of 80,000 minutes of US origin-UK telex yielding a year-end total of over $88,000 after payouts;[26] and third, it projects $32,148 from UK-destined traffic that transits the US mainland, based on existing volumes handled via Italy and an incremental return derived from the elimination of payouts to TRT's Italian correspondent in the indirect routing.

16. We find that TRT's projected total UK-destined telex traffic (yielding $120,148 in revenues) is a reasonable estimate of maximum business that might be expected in the first year of operation. Accordingly, it would not appear, absent a showing by other carriers of negative or only marginal profitability at present, that any significant drain on revenues would be suffered by existing carriers. The initial dilution in telex revenues would constitute only 2.7% of the projected growth in US/UK telex revenues for 1974, or 0.5% of projected total industry telex revenues, indicating that the effect on the overall revenue and profit position of the carriers in the US/UK telex market will be *de minimis*.[27]

17. With respect to the US/UK leased voice channel business, data available at the Commission indicates that AVD traffic will support substantial growth in the number of circuits in operation. At year end 1973 there were a total of 137 voice-grade circuits in operation between the US mainland and the UK, consisting of 29 bearer circuits (used for telegraph grade services) and 103 AVD circuits. In 1977 the projected total for this market is 223 circuits with growth in AVD (180 out of 223 circuits) representing the most significant component to such total increase. It would appear, therefore, that additional competition in this area, pursuant to TRT's proposal is reasonably feasible.

18. The potential impact of TRT's proposed operations in the entire European market is relevant here. Presumably, TRT, with direct circuits to the UK, would develop business to points beyond and thus compete with the existing carriers for traffic transiting UK. Using TRT's projected $120,148 in UK-destined telex revenues to project a 0.5% participation in the US–UK telex market in 1974, it is difficult to imagine that TRT would participate in such a large proportion of UK transit traffic as to threaten the profitability of the other carriers. Moreover, the objecting carriers in this matter have not offered any data to support the proposition that TRT's certification for

[26] This estimate of 80,000 telex minutes is based upon TRT's record of increasing volume via the existing indirect route, and a projected impulse jump of 20% (16,000 minutes) when direct service is implemented. There is some confusion in the application as to whether the impulse factor had been computed into the original 80,000 minute estimate. For purposes of this analysis we shall use the more conservative estimate (80,000 minutes).

[27] With respect to message telegraph traffic, we project at paragraph 21, *infra*, that TRT is likely to receive approximately $46,530 in revenues for 1974. This represents only 1% of the total industry message telegraph revenue that might reasonably be projected for 1974.

direct UK facilities would threaten the feasibility of competition in any of the services provided in the European region.

19. Next we examine the question of whether TRT can be a viable competitor. Its direct annual costs for the proposed facilities, itemized in paragraph 5 above, total $46,816 or $49,264 per subdivided circuit, and $41,126 or $43,574 per AVD circuit (depending upon which US mainland earth station is used). According to TRT, annual telex revenues will total $120,148; no revenue is projected for message telegraph business for purposes of this application; and leased telegraph channel is expected to yield $26,640. RCAGC challenges the telex revenue figure by first suggesting that, for the projected 80,000 minutes of US-origin-UK traffic, TRT should compute a payout of $0.475 per minute to Western Union rather than the $0.317 apparently applied.[28] Secondly, RCAGC has argued that the figure used for UK-destined traffic that transits the US is inflated and that TRT could only reasonably expect to receive a maximum of $0.27/minute in incremental revenue over the direct circuit, reducing substantially the $32,148 projection.

20. If we were to reevaluate TRT's telex traffic projection to reflect the standards suggested by RCAGC, i.e., payouts to WU of $0.475/minute and a $.27/minute increment in transit traffic revenue,[29] net US origin revenues would total $79,800 [30] and net US transit revenues would total $21,354,[31] yielding an overall total of $101,154. It is noted that this represents 2.3% of the projected industry growth in telex revenues for 1974, or 0.4% of total industry telex revenues. Direct costs associated with the subdivided circuit would include lease charges to AT&T of $8424 per year (if the Andover earth station is transited), lease charges to Comsat of $34,200 per year, depreciation of $2040 per year, and $4600 for operation and maintenance—a total of $49,264 per year. It is clear from the foregoing that minimum projected telex revenues will adequately cover direct costs associated with the subdivided circuit. For the purpose of allocating indirect costs, we shall follow the approach in our *Puerto Rico Order* and assign 25% of direct costs as general and administrative expense (the primary component of indirect expense). Total operating costs for the subdivided circuit will therefore total $61,580. It appears that telex revenues alone could cover total costs without including revenues derived from telegraph leased channel service or from telegraph message service.

21. With respect to the proposed acquisition and operation of two voice-grade circuits for the provision of leased voice-grade services, it appears that, should the demand exist, the projected circuit costs will be met and exceeded by customer receipts based on the charges proposed by TRT. (See paragraph 6 above.) Accordingly, in light of our finding in paragraph 17 above, that additional competition in US/UK leased voice channel business is reasonably feasible, we believe

[28] It is noted that RCAGC does not dispute the projection that TRT will handle 80,000 minutes of US origin-UK telex traffic.

[29] It is noted that in its opposition TRT has, for purposes of argument, applied these standards to its volume projections but does not make clear what effect this would have on total (as distinguished from incremental) revenues.

[30] If 90% of projected telex traffic were to be exchanged with WU.

[31] This is based on telex volume and revenue data on file at the Commission relating to TRT's US transit-UK telex traffic (via Italy) for the last six months of 1972 and first six months of 1973.

that a grant of authority to TRT to acquire and operate one voice-grade circuit for leased voice channel use is justified and that additional circuits may be warranted in the future upon specific showing of customer need therefor.

22. Pursuant to the standard of analysis set out in paragraph 13 above, we must now address the question of whether the proposed competition of TRT will serve the public interest. Accordingly, we will attempt to gauge the effect of authorization on TRT as well as on the other carriers providing service to the public. We find that there is a reasonable expectation that the public interest will be served as follows:

(a) An authorization to TRT to provide service with its correspondent in the UK on a direct basis rather than on an indirect basis through Italy should improve efficiency to the extent that traffic no longer must be switched through the Italian switching system and be hauled between Italy and the UK over landline facilities. A direct satellite circuit between the US and the UK will eliminate the need for the landline haul and thereby reduce the chance of outages since every segment of a communications network can contribute to total outages;

(b) Leased voice and telegraph channel services would be made available to exclusive TRT subscribers in New Orleans and Miami and to other customers in those areas wishing to avoid the added expense of landline charges for accessing facilities of the other carriers in New York, San Francisco, and Washington, D.C.; and

(c) Added competition, found here to be reasonably feasible in all services, would serve the general purpose of maintaining good service and improving it in the US/UK market.[32]

23. With respect to TRT's overall corporate condition in regulated operations, it is obvious that implementation of a profitable venture in service to the UK will contribute to the viability of TRT and thus enhance the scope and quality of its service to its customers. This financial boost is not to be considered a material or independently dispositive reason for authorizing the proposed operations, pursuant to a "route strengthening" argument posed by TRT; but, having found competition reasonably feasible and a prima facie showing of public interest in the proposed telex, message telegraph and leased channel service, we take note of the beneficial impact on TRT and, ultimately, the public interest.

24. It is asserted that a full evidentiary hearing is required to resolve the "basic policy issue" raised by TRT's proposed entrance into the US/UK market. We have found herein that additional competition brought by TRT's proposed operations will have no appreciable impact on the stability of the relevant market presently or in the foreseeable future. This case cannot, as ITTWC has suggested, be analogized to the application of TRT for 90 TAT-6 circuits to serve points in Europe directly (with ITALCABLE and other potential foreign correspondents) that was dismissed by the Commission as not providing "necessary data which would support the grant of an

[32] See 346 US 86, 96.

application of a fourth carrier to enter generally into the market to compete for traffic to Europe, Africa, and the Middle East." [33] Here, TRT has applied for authority to lease and operate three voice-grade circuits to serve the UK directly and other points via the facilities of the BPO; it has not applied for authority to purchase 90 cable circuits and serve European points generally. As to future growth of TRT in Europe, this, of course, depends upon whether TRT seeks authority to serve other points in Europe and, if so, whether it can present data sufficient to support a finding that a grant of any such application is in the public interest. Accordingly, no all-encompassing policy issue, requiring hearing, is presented in this matter.[34]

25. It is also argued that TRT's proposed entrance into the market should be considered in light of the threat posed by the possible entry of AT&T into the international switched data field (dataphone). We find that concerns relative to the impact of international dataphone on the IRC's European operations should be directed to the Commission's pending Dataphone Inquiry (Docket No. 19558) where they will be considered in light of overall industry conditions. We are concerned here with the very narrow question of whether the present and future public interest is served by granting a TRT application for authority to serve a specific point.

26. Another challenge relating to the potential impact of TRT's proposed service on existing market conditions is that expansion of TRT operations from its Miami and New Orleans gateways prior to resolution of major gateway expansion issues under consideration in the Commission's Docket No. 19660 would give TRT an undue competitive advantage and, according to ITTWC, prejudice ITTWC's ability to succeed in maintaining viable operations in its prospective new Miami and New Orleans gateways. This, it is argued, raises questions under *Ashbacker*.[35]

27. We note first that TRT's application requests authority to expand service from its existing gateway cities to include a specific overseas point, while ITTWC (and RCAGC) have sought in their pending applications to operate generally out of New Orleans and Miami (among others) as entirely new gateways. The Commission's Docket 19660 is designed to study the policy questions raised by the latter and any action taken with respect to the former will not prejudice full and unfragmented consideration of the docket and the RCAGC and ITTWC applications.[36] With respect to the alleged competitive advantage to be gained by TRT, we find that *Ashbacker* and its doctrine of "mutual exclusivity" do not apply in this instance to require deferral of TRT's application and comparative hearing. The

[33] 35 FCC 2d 801, 823.

[34] ITTWC raises the point that the IRC's free direct access tariff submission was rejected as proposing too significant a restructuring of the domestic landline industry, and argues that TRT's proposal is analogous, requiring hearing. This argument is without merit as no hearing requirement was made by the Commission in its Memorandum Opinion and Order (FCC 73–532) released May 21, 1973 (Section 214 applications were recommended) and even if it had, the proposed change in the status quo was clearly distinguishable from TRT's instant proposal.

[35] See *Ashbacker Radio Corporation* v. *FCC*, 326 US 327 (1945).

[36] With respect to the International Formula issues under consideration in Docket 19660, we disagree with ITTWC that implementation of TRT's proposed service will aggravate the alleged inequities of the formula in such a manner as to warrant deferral of action on the TRT application.

hearing requirement has, indeed, been expanded from its original application in a case involving competitive radio broadcast license applications that were technically mutually exclusive. In Collier,[37] for example, two competing microwave common carrier applications which posed no technical problem, but which nevertheless raised questions as to the public need for more than one service and considerations relating to the desirability of permitting competitive services to operate in a given area, were set for comparative hearing pursuant to *Ashbacker*. Mutual exclusivity has been defined in a Civil Aeronautics Board case to require comparative hearing "where the applications of two qualified applicants for a license are, as a matter of economic fact, mutually exclusive. . . ." [38] No showing has been made here, however, as to the specific applicability of mutual exclusivity to the relevant Section 214 requests for authority and as to the relation of this concept to the economic analysis set out above. If the concept were deemed relevant here, TRT's application is clearly not one of two or more pending applications for like and conflicting authority. In addition, assuming *arguendo* the TRT UK application and the ITTWC and RCAGC gateway expansion applications were directly competitive, it would be an unreasonable extension of mutual exclusivity and the hearing requirement to render it applicable where no prima facie showing has been made that a possible "competitive advantage" to TRT would preclude, as a matter of economic fact, later participation of ITTWC and RCAGC in gateway operations in Miami and New Orleans.[39] Moreover, if we were to adopt an *Ashbacker* approach in this situation, the unconscionable but logical conclusion would be that TRT could add nothing to its current facilities operating to and from New Orleans and Miami until the general gateway expansion issues in Docket No. 19660 have been received. By the same token, as TRT has pending in the same docket an application for authority to open a new gateway in New York, the other IRC's would be restrained from supplementing any of their facilities to and from their existing New York gateway.

28. The Commission intends to avoid taking a piecemeal approach in resolving the gateway expansion issues generally. In the interim, however, specific facilities applications of the U.S. international carriers, relating to operations in existing gateway cities, should be considered pursuant to the standard of market analysis set out in paragraph 12 above with emphasis on a gauging of current and reasonably foreseeable market conditions.

29. Finally, we address the questions raised by RCAGC concerning the proposed division of tolls for TRT/BPO message telegraph service and its alleged inconsistency with a Commission policy favoring equal divisions on parallel routes. According to RCAGC, the division of tolls agreed to by TRT represents a concession to BPO's recent demand for a larger share of revenues at a time when the other U.S. carriers are actively negotiating with BPO to halt such a change. RCAGC

[37] *Collier Electric Company* and *American Telephone and Telegraph Company*, 14 RR 848 (1956).

[38] *Delta Airlines* v. *CAB*, 228 F 2d 17 (1955).

[39] Questions raised herein by ITTWC regarding the Commission's application of *Ashbacker* in its order authorizing TRT to acquire a direct circuit to Puerto Rico are currently under consideration in the pending TRT Petition for Reconsideration, filed May 30, 1973; thus, it would be inappropriate to address the issue in this matter.

argues that if TRT is not required to maintain the same position with respect to BPO divisions as the other carriers, pursuant to Commission policy, the other carriers will be "whipsawed" into acceding to BPO's new terms. TRT does not address the specific policy issue but, in its November 6, 1973 filing of additional information, suggests that, pursuant to prevailing international practice permitting a foreign correspondent to set its own terminal charge,[40] TRT believed it appropriate to accept the terms offered by BPO.

30. We note that as a rule the divisions of tolls arrangements between U.S. carriers and foreign correspondents for message telegraph service have in common the following basic components:

(1) A statement of overall charge per word collected from customers;

(2) An accounting rate expressed in gold francs per word (somewhat less than the charge collected) from which each party derives a portion for its share of the international circuit costs and for its terminal costs ("terminal charge"); and

(3) A dollar conversion ratio applicable to the gold franc figures.

In the case of a message originating via a U.S. carrier, the net retention per word would be computed by adding the difference between the charge collected and the accounting rate, to the U.S. carrier's share of the accounting rate figure. Assuming all other components remained constant, if the receiving company should insist upon an increase in its terminal charge allocation its share of the accounting rate would rise and reduce the overall per word retention of the sending company.[41] In the instant case, it appears that, while TRT's proposed agreement with BPO contains the same 50/50 division for international circuit costs as the existing agreements, its terminal charge allocations indicate an increase in BPO's share. Accordingly, TRT has agreed to a higher accounting rate and a lower overall per word retention.

31. While there is some merit to RCAGC's argument, it would be unreasonable to deny TRT's entire application on those grounds, having found that a grant of the application would be in the public interest. A more reasonable approach would be to condition the grant of the application so as to assure that TRT's provision of message telegraph service does not interfere with the delicate negotiations in which the other U.S. carriers are engaged. Therefore, we shall herein authorize TRT to provide direct message telegraph service provided that TRT submits to the Commission an operating agreement with the BPO which is consistent with similar agreements in effect between the BPO and other U.S. carriers.[42] Until such an agreement is submitted and is found acceptable by the Commission, the authorization herein for the provision of direct message telegraph service between

[40] As embodied by the 1973 ITU Telegraph Regulations, Article 8, para. 24.

[41] Ultimately the result may be to cause the sending company to raise its customer rates.

[42] This filing should also show that the necessary operational equipment additions and modifications referred to in paragraph 2 of the proposed TRT/BPO operating agreement have been accomplished and that implementation of direct message telegraph service is, in fact, feasible.

the United States and the United Kingdom shall not become effective. At present, TRT has a tariff on file with the Commission for the provision of indirect message telegraph service between the U.S. and UK via Italy, and is providing service to its customers pursuant to that tariff. We believe that TRT has a responsibility to those customers to continue this service pending its compliance with the terms and conditions of this Paragraph.

CONCLUSION

32. In view of the foregoing, and upon consideration of all the pleadings and relevant data herein, we find and conclude that the public interest would be served by a partial and conditional grant of TRT's application (T–C–2335–3).

ORDER AND CERTIFICATE

33. In view of the foregoing, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require that TRT Telecommunications Corporation acquire and operate two voice-grade satellite circuits between the United States and the United Kingdom.

34. Accordingly, IT IS ORDERED, pursuant to Section 0.294 of the Commission's Rules on Delegations of Authority, that the subject application, File No. T–C–2335–3, of TRT Telecommunications Corporation IS GRANTED IN PART AND CONDITIONALLY; and

(A) TRT is authorized to

(1) Acquire by lease and operate two voice-grade landline circuits between TRT's operating center in Fort Lauderdale, Florida and a satellite earth station on East Coast of the United States; and

(2) Acquire by lease and operate two voice-grade satellite half-circuits between the earth station and an appropriate satellite located over the Pacific Ocean, connecting with matching half-circuits provided by its correspondent, the British Post Office between the satellite and an earth station in the United Kingdom; and

(3) Subdivide one of the satellite circuits authorized herein in accordance with the Commission's Memorandum Opinion, Order and Authorization adopted October 9, 1968, *ITT World Communications Inc.*, 14 FCC 2d 818; and

(4) Use the subdivided circuit authorized herein to provide message telegraph, telex and other non-voice services, between the United States and United Kingdom and points beyond, and use the other circuit authorized herein to provide leased voice channel services, including voice-equipped-for-data and/or alternate-voice-data (AVD) between the United States and United Kingdom and points beyond;

(B) This authorization shall be continued on a year to year basis commencing January 1, 1975, unless the Commission notifies the applicant to the contrary and requires the filing of a new application on or before December 1 of the then current authorization term;

(C) TRT shall submit quarterly reports of traffic, revenues and costs associated with the service authorized herein for a period of one year;

(D) Authorization of the facilities referenced herein shall be subject to Commission review at such time as it may reasonably be determined whether or not the provision of message telegraph service via these facilities is feasible and consistent with Commission policy;

(E) The petitions to deny of ITTWC, RCAGC and WUI ARE HEREBY DENIED;

(F) TRT shall comply with the provisions of Paragraph 31 herein; and

(G) Jurisdiction is retained over all aspects of this matter, specifically including, if necessary, the reallocation of circuits in the satellite system among the various carriers and other authorized users, if any, and from voice to record carriers, or record to voice carriers, and between record carriers, in order to insure that all present and future authorized carriers shall have nondiscriminatory use of and equitable access to the communications satellite system.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-469

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.606(b), TABLE OF ASSIGNMENTS, TELEVISION BROADCAST STATIONS (EAST LANSING, MICH.)	Docket No. 19739 RM-2052

REPORT AND ORDER

(Adopted May 1, 1974; Released May 6, 1974)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN, REID AND HOOKS ACTING AS A BOARD; COMMISSIONER QUELLO NOT PARTICIPATING.

1. The Commission has before it for consideration the May 9, 1973, Notice of Proposed Rule Making in this proceeding (38 Fed. Reg. 13491, published May 22, 1973) and comments from the proponent, the Board of Trustees of Michigan State University, seeking the designation of television Channel 23 at East Lansing, Michigan, as an educational assignment.

2. In its petition and comments the Board of Trustees pointed out that it was operating a noncommercial educational station on UHF Channel 23. [Although it was not mentioned in the original petition, it formerly shared time in the operation of VHF Channel 10 licensed to nearby Onondaga, Michigan.] In effect, the petition sought recognition of the actual use of the channel. In addition to Channel 23, Channel 69 was also listed as an East Lansing assignment, and the Board of Trustees urged us to leave the educational designation of this channel undisturbed. Other than the Board of Trustees, no party expressed any interest in the proceeding.

3. Since Channel 23 was already being put to educational use, the proposal to give *de jure* status to this *de facto* situation presents no complication. We believe that it is appropriate for the Table of Television Assignments to reflect the actual usage of the channel and it shall be charged accordingly. As to continuing the reserved status of Channel 69, however, the situation is not quite as simple. If the reservation were terminated, the channel would still be available for educational use, and for the first time it would become available for commercial use as well. On the other hand, since East Lansing has only two assignments, the proposal to maintain the reservation would effectively preclude the establishment of any commercial operation in East Lansing. Ordinarily, we would not be disposed to follow a procedure that would lead to allowing a channel to remain fallow for some period while interest in its educational use develops, when at the same time no commercial channel is available and an educational operation already exists. However, the situation involved here is atypical

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because of the proximity of Lansing which has three channel assignments. Only Channel 6 of the three is in use; Channels 36 and 53 are vacant. Lansing is the far larger of the two communities and quite probably the more logical choice for locating a commercial station. In addition, lower UHF channels tend to be selected first, further suggesting that anxiety over foreclosing commercial use of Channel 69 is premature. Under these circumstances, we do not think it necessary to remove the reservation on Channel 69. If an interest in its use on a commercial basis should develop, we could then entertain an appropriate petition for rule making. In the meantime, we see no need to act on supposition about such future interest.

4. Therefore in accordance with the provisions of Sections 4(i), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, IT IS ORDERED, That, effective June 14, 1974, the Television Table of Assignments, Section 73.606(b) of the Commission's Rules, insofar as the community listed below is amended to read as follows:

City:	*Channel No.*
East Lansing, Mich	*23, *69

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-419

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of VIDEO LINK, LTD., PERRYOPOLIS, PA. PERRY TOWNSHIP, PA. For Certificates of Compliance	CAC-1669, PA02B CAC-1670, PA03B

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released May 1, 1974)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN; AND REID CONCURRING IN THE RESULT.

1. On December 4, 1972, Video Link, Ltd. filed the above-captioned applications for certificates of compliance for proposed cable television systems in Perryopolis, Pennsylvania and Perry Township, Pennsylvania.[1] Perryopolis and Perry Township are located within the Pittsburgh, Pennsylvania major television market (#10). Video Link has requested authorization to carry the following signals on both systems:

Pennsylvania:
- KDKA-TV (CBS, channel 2), Pittsburgh.
- WTAE-TV (ABC, channel 4), Pittsburgh.
- WIIC-TV (NBC, channel 11), Pittsburgh.
- WQED (Educational, channel 13), Pittsburgh.
- WQEX (Educational, channel 16), Pittsburgh.
- WPGH-TV (Independent, channel 53), Pittsburgh.

Ohio:
- WKBF-TV (Independent, channel 61), Cleveland.
- WUAB (Independent, channel 43), Lorain-Cleveland.

West Virginia:
- WTRF-TV (NBC, channel 7), Wheeling.

Ohio:
- WTRF-TV (NBC, channel 7), Steubenville.

Pennsylvania:
- WJAC-TV (NBC, channel 6), Johnstown.

Ohio:
- WSTV-TV (CBS/ABC, channel 9), Steubenville.

West Virginia:
- WSTV-TV (CBS/ABC, channel 9), Wheeling.

Carriage of the Pittsburgh stations and of WKBF-TV and WUAB is consistent with Section 76.61 of the Commission's Rules. WJAC-

[1] The population of Perryopolis is 1799; Perry Township has a population of 3270. Video Link is constructing its systems with twenty-channel capacity.

TV, WTRF–TV, and WSTV–TV are distant network affiliates for whose partial carriage Video Link requests a temporary waiver of Section 76.61 of the Rules. Under paragraph (b) (2) of this Section a cable television system located within one of the first fifty major markets is authorized to carry as a portion of its total signal complement a minimum of three independent stations. Video Link can receive the signal of the local independent, WPGH–TV, over-the-air, but WKBF–TV and WUAB must be received by microwave. Video Link stated that the necessary microwave facilities cannot be provided at this time and requests temporary authorization to carry a composite of the non-network programming of WJAC–TV, WTRF–TV, and WSTV–TV as a substitute until such time as reasonable provision can be made for carrying WKBF–TV and WUAB. An objection to this proposal was filed by Westinghouse Broadcasting Company, Inc. (Group W), licensee of Station KDKA–TV, Pittsburgh, Pennsylvania, and Video Link has replied.

2. In its opposition, Westinghouse argues that Video Link has not proffered sufficient factual allegations supporting its request. Westinghouse also notes Video Link's pending applications for systems at Greensboro, Nicholson Township, and Marianna Borough, Pennsylvania, communities near Perryopolis and Perry Township. In these applications carriage of WKBF–TV and WUAB is requested and no difficulty as to the provision of microwave facilities is cited.

3. In support of the requested temporary authorization Video Link cited Paragraph 18 of the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 333, which states in pertinent part, ". . . in certain areas of the country, carriage of syndicated programming from full or partial network stations instead of from independents might be indicated because of inordinate costs involved in obtaining independent signals." Video Link states that an investigation of the situation was made, and that no microwave facilities exist to serve the communities of the systems. Microwave companies quoted prices ranging from $1200 to $1300 per month to provide the necessary facilities. Video Link estimates that its systems will pass 1200 to 1300 homes, and, with 500 to 700 potential subscribers, the additional cost to each would be $2.00 per month. Video Link contends that such an increase would be prohibitive and would serve to discourage potential subscribers. Finally, Video Link asserts that Westinghouse's contention that its present applications are inconsistent with its applications for Greensboro, Nicholson Township, and Marianna Borough is incorrect. Video Link explains that the Greensboro and Nicholson Township systems will operate off the same headend as Video Link's Masontown system with a potential subscriber total of 5000 homes; thus, a waiver was not sought because the microwave facilities can be afforded. Immediate reception of WKBF–TV and WUAB is not contemplated in Marianna Borough. Because Video Link is entitled to carry WTRF–TV and WSTV–TV on the latter

system pursuant to Section 76.61(a)(4), suitably diverse programming can be provided until such time as the importation of the Cleveland and Lorain stations can be arranged.

4. We find that Video Link has made a sufficient showing to justify a waiver of our rules, and we accordingly grant the temporary relief requested. In particular, we note that immediate provision of microwave services apparently would increase the yearly rate from $54.00 per subscriber to $78.00 per subscriber. The impact of this increase of almost 50% would be to reduce the number of potential subscribers thereby jeopardizing the planned cable television service to the two communities. We stated in *Vilas Cable Inc.*, 40 FCC 2d 637, involving a similar situation that "the predicted microwave costs of importing a distant signal would place a severe strain on the financial resources of a system which can hope to attain only a few hundred subscribers," and we granted a waiver of our rules.[2] We conclude that the public interest would be served by granting the temporary relief requested in this case.[3] However, we emphasize that the duration of this temporary authorization will extend only until such time as Video Link can make economically feasible arrangements for microwave facilities to deliver the signals of WKBF–TV and WUAB.

5. We note that Video Link's franchises do not entirely conform to the provisions of Section 76.31 of the Rules. The identical franchises, which were awarded on December 29, 1971, are for a twenty-five year term and provide for neither the establishment of a local business office for resolution of subscriber complaints nor for the amendment of the franchise pursuant to Section 76.31(a)(6). However, Video Link commits itself to resolve all subscriber complaints promptly, and Section 2 of the franchises specifies that Video Link shall be subject to all present and future regulations of the Commission. Only substantial compliance with Section 76.31 of the rules must be demonstrated for franchises granted prior to March 31, 1972.[4] We find that these franchises substantially comply with Section 76.31 of the rules in a manner sufficient to justify the grant of the above-captioned applications until March 31, 1977.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Opposition to Application for Certificates of Compliance" filed by Westinghouse Broadcasting Company, Inc. IS DENIED.

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[2] The population of the community in the *Vilas Cable* opinion was 1306; only a "few hundred" subscribers were anticipated, and the estimated monthly microwave cost was $300.

[3] *Lyons CATV, Inc.*, FCC 73–1137, 43 FCC 2d 910 (1973).

[4] *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10 (1972), *recons. denied*, FCC 73–293, 40 FCC 2d 493 (1973).

IT IS FURTHER ORDERED, That the "Application(s) for Certificate(s) of Compliance" (CAC–1669, 1670) filed by Video Link, Ltd. ARE GRANTED and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R-167

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
THE WESTERN CONNECTICUT BROADCASTING CO. (WSTC), STAMFORD, CONN.	Docket No. 19872
For Renewal of License	File No. BR-1150
RADIO STAMFORD, INC., STAMFORD, CONN.	Docket No. 19873
For Construction Permit	File No. BP-19162

MEMORANDUM OPINION AND ORDER

(Adopted May 7, 1974; Released May 9, 1974)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT; BOARD MEMBER BERKEMEYER DISSENTING IN PART AND VOTING TO ADD A MISREPRESENTATION ISSUE.

1. The above-captioned mutually exclusive appplications were designated for hearing by Commission Order, FCC 73-1186, released November 21, 1973, 38 FR 32971. On January 18, 1974, Western Connecticut Broadcasting Company (Western), the licensee of Station WSTC and a renewal applicant in this proceeding, filed a motion [1] to enlarge issues with respect to Radio Stamford, Inc. (Radio Stamford) as follows:

> 1. To determine whether Radio Stamford, Inc., misrepresented facts or was lacking in candor in connection with statements made to the Commission;
>
> 2. To determine, with regard to Radio Stamford, a. The amount of Public Service Programming proposed and the scheduling thereof; b. Whether in view of its proposals as to staff Radio Stamford's program proposals are reasonably capable of effectuation; c. Whether the proposed programming of Radio Stamford meets public interest standards with regard to program length commercials; d. Whether, in view of the above Radio Stamford is qualified to operate the station in the manner proposed and in accordance with the public interest.

2. Western concedes that its motion to enlarge was not timely filed. However, it contends that because of the nature of this proceeding good cause exists for its approximately one month delay in filing. Particularly, it notes that Western has just completed a revocation proceeding and urges that until that matter was concluded it could not properly devote its attention to the instant proceeding. Moreover, it contends that once the comparative proceeding was designated for

[1] Also before the Board are: (a) comments, filed February 15, 1974 by the Broadcast Bureau; (b) opposition, filed March 11, 1974 by Radio Stamford; and (c) reply, filed April 19, 1974 by Western.

hearing extensive research in the Commission's files and several trips to Stamford, Conecticut, were necessary before its motion to enlarge could be filed. The Bureau urges that Western's participation in the revocation proceeding, which was, for all practical purposes, concluded when its proposed findings were filed on April 13, 1972, does not constitute good cause for its late filed pleading. However the nature of this proceeding and the subject matter of the motion to enlarge persuades the Board that Western's motion to enlarge should be considered on its merits.

3. *Misrepresentation.* In support of its request for a misrepresentation issue, Western relies upon certain statements made in Radio Stamford's Exhibit C 1, filed with its application. In that exhibit, prepared by Mrs. Sylvia Dowling, a stockholder, vice president, and proposed station manager, Radio Stamford describes its proposed programs designed to meet the community problems which it had ascertained. Specifically, Western notes that in the descriptive material concerning a program called Rap Session, Radio Stamford stated: "the other host will be State Senator William Strada, a young attorney legislator who also has the respect of the entire community", and in its description of the program It's Your Air, Your Water, Your Land, Radio Stamford stated: "This program would revolve around the talents of Edward Connell who would be the host." Western alleges that Radio Stamford had not discussed its proposal with Senator Strada or Mr. Connell and that Radio Stamford's modification of that exhibit by a subsequent amendment to show those individuals as "suggested hosts", and explaining that the persons listed were included to illustrate the caliber of individuals it hopes to attract, was filed only after the persons involved complained.

4. In opposition, Radio Stamford concedes that it did not discuss its proposal with either of these individuals or with other persons specifically listed as hosts or moderators in its proposed programs. It contends, however, that to have done so at the beginning of what was sure to be a long and hotly contested comparative proceeding would be preposterous. Moreover, Radio Stamford contends that Western took its statement with respect to Senator Strada out of context. It points out that the entire pertinent context reads as follows: "This program hopefully will be co-hosted by Hardy Dixon . . . the other host will be State Senator William Strada, a young attorney legislator who also has the respect of the entire community". Furthermore, Radio Stamford alleges that its amendment which made clear that its proposed hosts and moderators had not been interviewed was not filed "only after the parties concerned threatened to disclose the matter to the Federal Communications Commission", as contended by Western. In support of this allegation, Radio Stamford submits affidavits from Senator Strada and Mr. Connell to the effect that they on no occasion threatened to disclose to the Commission the fact that Radio Stamford had used their names without their prior permission.

5. The requested misrepresentation issue will not be added. The Board agrees with the Broadcast Bureau that while Radio Stamford may well have intended to convey the impression that it had made the necessary arrangements to implement its proposed programming, its

failure to have discussed those programs with the persons upon whom it purported to rely is not *per se* evidence that the programs could not be effectuated. Moreover, it is apparent from the affidavits submitted with Radio Stamford's opposition that neither Senator Strada nor Mr. Connell have foreclosed the possibility that they will participate in such programs should Radio Stamford become the licensee of a station in Stamford, Connecticut. Thus, while Radio Stamford's failure to obtain advance assurances from its proposed program participants may cast some reflection upon its judgment, we do not believe that in the circumstances of this case it raises a question as to an intent to misrepresent the facts to the Commission. Our determination in this regard is reinforced by the voluntary disclosure by the applicant that the named individuals were included only to illustrate the quality of the people it hopes to attract.

6. *Programming.* Western requests issues inquiring into three matters relating to Radio Stamford's proposed programming. The first has to do with what it alleges is the vagueness of Radio Stamford's proposal. Specifically, Western contends that the programming proposal submitted by Radio Stamford in many instances does not specify the time frame, the frequency or the length of proposed programs and thus it is impossible to determine the actual amount of public service programming which Radio Stamford has proposed. Western relies on an analysis made by its principals of Radio Stamford's amended Exhibit C 1 to support this contention. It contends that no specific information as to time segments is given for any of the proposed programs; at best, with respect to some, there is a general statement indicating that a particular program will be broadcast Sunday evening or Sunday or some other such time, but even this degree of specificity applies to only a few programs. Petitioner also notes that as to many of the programs no information is provided as to when they will be broadcast or how frequently. For example, it cites the program "For Rent", 5 to 10 minutes, often repeated. This description does not, Western contends, contain any information as to when or how often it will be heard, and, as to a program entitled "Reporter's Notebook", there is no indication as to whether it will be broadcast once a day, once a week, once a month or once a year, etc. Petitioner then lists fifteen programs which, it contends, are also inadequately described. In these circumstances, Western concludes, an issue is warranted.

7. In opposition, Radio Stamford argues that Western's difficulty stems from an "attempt to mischaracterize Radio Stamford's program proposal". Radio Stamford relies on an affidavit from Mrs. Dowling which purports to clarify its program proposal and which, it argues, shows that Radio Stamford has proposed, as set forth in Exhibit C 1, 8 hours and 50 minutes of regularly scheduled weekly public affairs programs, and 5 hours and 37 minutes of regularly scheduled other programs, exclusive of entertainment and sports. In the same exhibit, Radio Stamford explains, it has also set forth other public service programs which will be presented when the subject matter is of particular interest and the time is available. The objective of Exhibit C 1, Mrs. Dowling asserts, is to present to the Commission Radio Stamford's overall proposal for programming of the station over the three

year license period and not to depict a weekly program schedule. To further clarify Radio Stamford's position, Mrs. Dowling attaches an exhibit to her affidavit which sets forth the titles of the public affairs and other programs which would appear in its regular weekly schedule and another exhibit which sets forth the titles of the public affairs and other programs which would appear occasionally as deemed appropriate.

8. The Board is satisfied that Radio Stamford's application and supporting exhibits, as amplified by the affidavits of Mrs. Dowling and the supporting exhibits filed with Stamford's opposition to the motion to enlarge, describe its program proposals with sufficient specificity. The issue requested by Western is therefore not warranted and will be denied.

9. The second issue related to programming which has been requested by Western concerns the ability of Radio Stamford to broadcast the programs which it has described with the staff which it has proposed. Essentially, Western relies on the affidavits of two of its staff members to support its contention that Radio Stamford cannot produce the programs it proposes with the staff available for their production. In opposition, Radio Stamford contends that part of the problem flows from Western's misanalysis of its program proposal, discussed in paragraph 6 above, and in part from Western's misunderstanding of Radio Stamford's staffing proposal since it does not take into consideration the expertise of its proposed public affairs and news staff which, Radio Stamford asserts, will all be skilled journeymen quite capable of performing their duties with a minimum of supervision.

10. The requested issue will be denied. It appears to the Board that each of the applicants in this proceeding chooses to rely on persons associated with it as "experts" to support its contentions. The Board is satisfied that the programming and staffing proposals advanced by Radio Stamford are not unreasonable on their face,[2] and is not persuaded that the "expertise" of Western's employees is greater than that of the principals and proposed employees of Radio Stamford.[3] Therefore, we do not believe that petitioner has raised a substantial question as to Radio Stamford's staffing proposal.

11. *Program Length Commercials.* Western contends that despite the Commission's clearly enunciated policy against program length commercials Radio Stamford has proposed a number of programs which on their face appear to be program length commercials. Petitioner cites as examples of such programs Radio Stamford's proposed programs "For Rent" and "For Sale" which will publicize the availability of homes for rent and homes for sale, and a program entitled "Green Thumb" which proposes to give instructions on growing plants indoors and outdoors. Western argues that the "For Rent" and "For Sale" programs are comparable to programs which have been specifi-

[2] *Martin Lake Broadcasting Company*, 23 FCC 2d 721, 19 RR 2d 277 (1970); *Colorado West Broadcasting, Inc.*, 39 FCC 2d 691, 26 RR 2d 893 (1973).

[3] The long list of program proposals and staffing gleaned from New England station renewal applications does not appear to the Board to have any bearing on the problems to be faced by Radio Stamford since Western has failed to show any relationships among operating conditions in those communities and the conditions to be faced by Radio Stamford.

ally characterized by the Commission as program length commercials contrary to the public interest. Citing *Evening News Association*, FCC 73–1360, released December 19, 1973, and *WUAB, Inc.*, 37 FCC 2d 748 (1942). It also contends that the Commission's decision in *Taft Broadcasting*, 26 RR 2d 1025 (1973) dealt with a program similar to the "Green Thumb" program, proposed by Radio Stamford where the proposed "host" was the owner and operator of a plant nursery.

12. In opposition, Radio Stamford alleges that none of the programs cited by the petitioner will be sponsored by persons who have a commercial interest in the information being disseminated. Thus, Radio Stamford asserts, under no circumstances would it permit the "For Sale" or "For Rent" program to be sponsored by real estate or financial interests. Nor would it permit the companies whose listings are included on these programs to advertise on the station. Therefore, Radio Stamford contends, the critical element of "program length commercials", which is a program designed to sell a product as opposed to a program designed to convey information to the public, is missing from the proposed "For Rent" and "For Sale" program. As to the "Green Thumb" program, Radio Stamford argues that Mr. Bulpitt, the proposed host, is a nationally known authority on organic gardening and that he will not be the sponsor of the program nor will his nursery be advertised on the station. Further, Radio Stamford urges, Mr. Bulpitt's participation in this program may very well be contrary to his commercial interests since he is teaching home gardeners to raise their own plants rather than to purchase them from a nursery. The Board is satisfied in view of Radio Stamford's explanation concerning its proposed programs that the requested program length commercial issue is not warranted.

13. Accordingly, IT IS ORDERED, That the motion to enlarge issues, filed on January 18, 1974, by Western Connecticut Broadcasting Company (WSTC) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74R-172

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WOLVERINE RADIO CO., INC., MIDLAND, MICH.	Docket No. 19925 File No. BPH-8349
THE PATTEN CORP., MIDLAND, MICH. For Construction Permits	Docket No. 19926 File No. BPH-8461

MEMORANDUM OPINION AND ORDER

(Adopted May 9, 1974; Released May 13, 1974)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT.

1. The above-captioned mutually exclusive applications for a new FM broadcast station in Midland, Michigan, were designated for consolidated hearing by the Chief, Broadcast Bureau, in an Order released January 24, 1974, 39 FR 4813, published February 7, 1974. On February 13, 1974, The Patten Corporation (Patten) filed a petition requesting the Board to enlarge the issues with respect to Wolverine Radio Company, Incorporated (Wolverine) as follows:[1]

(1) To determine whether the estimated costs and first year operating costs of Wolverine Radio Company, Incorporated are reasonable, and if not, whether sufficient additional funds are available to Wolverine Radio Company, Incorporated, and whether in light of the facts so found Wolverine Radio Company, Incorporated is financially qualified to construct and operate its proposed station one year without operating revenue.

(2) To determine whether Wolverine Radio Company, Incorporated has made material misrepresentations or has been lacking in candor in its application before the Commission as regard to its assets and liabilities contained in the balance sheet filed with its application.

(3) To determine whether the Wolverine Radio Company, Incorporated proposal is in compliance with Section 73.315(a) of the Commission's Rules, and, if not, in light thereof whether Wolverine Radio Company, Incorporated is qualified to construct and operate as proposed.

(4) To determine whether the principals of Wolverine Radio Company, Incorporated made material misrepresentations or were lacking in candor in its application in regard to compliance with Section 73.315(a) of the Rules, and in light of the evidence adduced whether Wolverine Radio Company, Incorporated is qualified to be a licensee of the Commission.

[1] The Board also has before it for consideration the following related pleadings: (a) supplemental petition to enlarge issues, filed February 21, 1974, by Patten; (b) opposition, filed March 18, 1974, by Wolverine; (c) comments, filed March 18, 1974 by the Broadcast Bureau; and (d) reply, filed April 12, 1974, by Patten.

(5) To determine whether the proposal of Wolverine Radio Company, Incorporated would realistically provide a transmission service for Midland, Michigan, or for another, larger community.

(6) To determine whether a grant of the Wolverine Radio Company, Incorporated application would be consistent with Section 307(b) of the Communications Act of 1934, as amended; Section 73.202 of the Commission's Rules; and the principles upon which the assignment of a Class A FM channel have been made by the Commission.

2. The petitioner raises certain questions concerning the financial qualifications of Wolverine and alleges that Wolverine has lacked candor in setting forth its financial plan. Patten also contends that the Wolverine proposal does not comply with Section 73.315 of the Commission's Rules and Regulations and that, because the engineering exhibit upon which Wolverine relies was prepared by its principal stockholder, who is a resident of Midland, Michigan, we must infer that Wolverine has undertaken to mislead the Commission with respect to this matter. Patten urges that Wolverine has selected a site designed to give it coverage of the Saginaw-Bay City metropolitan area, rather than to provide the required signal to its principal city of license, and that this fact also raises various questions as to Wolverine's proposal.

3. More specifically, Patten contends that Wolverine's financial showing is deficient in that it has substantially understated its capital costs and operating expenses and inflated the liquid assets available to it. In support of this contention, Patten relies upon the affidavit of Horace W. Gross, who, it alleges, is an expert in making market studies and revenue projections, and in estimating broadcasting expenses and operating costs. Gross submits his analysis of Wolverine's financial plan and his own estimate of its expenses and funds available to meet those expenses. Gross contends that Wolverine has underestimated its capital expenses by approximately $2,000, the major item of which is $2,400 in attorney's fee to be paid at the rate of $200 per month. He also argues that Wolverine has neglected to include some $3,000 worth of preoperating expenses consisting of, among other things, a $900.00 permit grant fee, payments on the transmitter site lease and studio rentals, a salary for three months for the Chief Engineer, plus certain related insurance and tax expenses. He alleges that it is highly questionable whether Wolverine can carry out its programming proposal with its proposed staff; thus, he asserts, the monthly staffing expenses are also to some extent underestimated. Patten also argues that Wolverine's profits from sale of real estate will be substantially less than represented since Wolverine is required by its purchase contract to pay one-half the profits of a subsequent sale to the former owners if the property is resold before the contract purchase price is fully paid. Patten further contends that Wolverine has failed to reduce the estimated gross sale price of the real estate by approximately 10% for sales commissions, and that no provision has been made for legal fees or interest and principal payments made under the contract while the land is being held by Wolverine. Moreover, Patten argues that since Wolverine does not have a ready pur-

chaser it should not be accorded credit for the full appraised value of its land. In sum, Gross contends that Wolverine will have a liquid asset deficit of approximately $12,000.

4. In opposition, Wolverine alleges that a number of the expenses which are attributed to it by Patten will not, in fact, be incurred. Particularly, it maintains that there will be no real estate commission in conjunction with its sale of the land since it will handle the sale itself. Wolverine also alleges that its principals will personally absorb the interest payments on the land up to the time it is sold. Moreover, Wolverine contends that it will have no obligation to share its land sales profits with the prior owner of the property. In support of this contention, it relies upon a specific provision of its contract which gives it the right to increase its monthly payments or to pay the entire balance due at any time.[2] Wolverine also states that it will have no preoperating expense in connection with its chief engineer's employment, since that position will be filled by a Mr. Peloubet who is its principal stockholder and who will not receive any preoperating salary. Consequently, the applicant urges, there will be no tax obligation, workman compensation insurance or travel expenses in connection with the chief engineer's preoperational employment. Wolverine notes that its legal expenses are being paid by its principals at the rate of $200.00 per month and argues that, consequently, the corporation will not be required to expend the $2,400 for legal fees which Patten attributes to it. Wolverine contends, further, that any additional preoperational expenses and variations in its monthly operating expenses can be absorbed by its $2,600 allotment for contingent expenses.

5. The Review Board is satisfied that a financial issue is not warranted. The estimates submitted by Wolverine are not unreasonable on their face, as evidenced by the fact that Mr. Peloubet, who has had considerable experience in the operation of comparable FM broadcast stations, has set forth at some length the basis for such estimates. Under this circumstance, the addition of a costs issue is not warranted.[3] The question which would have the greatest bearing upon Wolverine's financial qualifications is the availability of the profit from the sale of land on which it relies for $13,000. However, the Board is satisfied that Wolverine's land purchase contract which gives it the opportunity to accelerate the payment of the purchase price provides reasonable assurance that all of the profit generated by the sale of its real estate will be available to Wolverine to finance its proposed station. The clause upon which Patten relies to the effect that if the land is sold before the contract purchase price is fully paid to the prior owners, Wolverine will share one half of its profit with the prior owner is not inherently inconsistent with Wolverine's right to retire the entire obligation before the sale of the property. Patten's contention, that the prior owner must share in the profits because under Michigan law the intent of the parties is controlling and the seller did not intend to permit the purchaser to accelerate its payments in order to

[2] Wolverine contends that it has available sufficient liquid assets to retire its contract obligation at any time and that the funds so expended would then be recovered upon its sale of the property.

[3] See *Viking Television, Inc.*, 17 FCC 2d 823, 16 RR 2d 123 (1969).

avoid sharing the profit on resale, is not persuasive. It is a fundamental principle of contract law, that the best evidence of the intent of the parties is within the four corners of the agreement which they signed. The right to accelerate payments is clearly set forth in the purchase contract and is not inconsistent with language relied upon by the petitioner. Accordingly, petitioner has not raised a substantial question as to whether Wolverine will have available to it the land sale profits upon which it purports to rely.

6. The Board is also satisfied on the basis of the carefully documented appraisal of the value of the land that Wolverine can reasonably expect to receive the $26,000 for the sale of that property which it estimates in its financing plan.[4] Nor does Patten's contention that Wolverine has not set forth the cost of the new antenna site specified in its amendment require a financial qualifications issue. For, as noted by the Presiding Judge in his order accepting the amendment, *infra*, Wolverine is required by the rules to amend its application to show any substantive changes in its financial qualifications. In the absence of specific allegations of fact concerning this matter by Patten the Board will assume that Wolverine has complied with the rules and that no substantive change in its financial position has occurred. Therefore no financial issue is warranted. Finally, in light of the foregoing, the Board finds no basis for an issue to determine whether Wolverine misrepresented its financial assets in its application or subsequent financial amendments.

7. Patten also alleges that the proposal submitted by Wolverine does not comply with the provisions of Section 73.315(a) of the Commission's Rules and Regulations,[5] and that Wolverine must be presumed to have deliberately misrepresented the facts by a submission of an outdated city map. Therefore, Patten contends, an issue concerning Wolverine's candor with the Commission should be included in this proceeding. In this connection we note that on April 5, 1974, Wolverine filed a petition for leave to amend which specified a new antenna site adjacent to the city of Midland. That amendment was accepted by the Administrative Law Judge by Order, FCC 74M–444, released April 18, 1974. It is agreed by all parties that the transmitter operating from the site proposed by Wolverine's most recent amendment would place a 70 dBu signal over all of the city of Midland, thus mooting the request for a Rule 73.315(a) issue. Furthermore, the Board is satisfied that, as amended, Wolverine's proposal raises no questions concerning its intent to serve Midland rather than the nearby large metropolitan areas of Saginaw and Bay City, and that no question has been raised regarding Wolverine's compliance with Section 307(b)

[4] We find no merit to Patten's contention that unless Wolverine produces a willing purchaser it may not rely on the profit generated by the sale. Nor are we convinced that *Dodge Point Broadcasting Co.*, 13 RR 2d 274 (1968), requires a different result. For, as the Bureau notes, that case merely held that the amount to be realized from the sales of two parcels of real property should have been reduced by one third to provide for anticipated fluctuation in the market. It did not hold that in all such cases the anticipated income should be so reduced. See also *Petit Broadcasting Co.*, 30 FCC 2d 930, 22 RR 2d 543 (1971).

[5] Section 73.315(a) reads as follows:

(a) The transmitter location shall be chosen so that, on the basis of the effective radiated power and antenna height above average terrain employed, a minimum field strength of 70 decibels above 1 microvolt per meter (dBu), or 3.16 millivolts per meter, will be provided over the entire principal community to be served.

of the act or Section 73.202 of the Commission's Rules. However, in view of the request for a misrepresentation issue concerning Wolverine's showing with respect to its coverage of Midland, some discussion of the petitioner's allegations and Wolverine's reference is warranted.

8. As noted above, petitioner contends that the maps submitted by Wolverine must be presumed to have been chosen for the purpose of misrepresenting the true facts. In response, Wolverine contends that there have been some recent changes in the boundaries of Midland, Michigan, and that the selection of the outdated map was inadvertent. To support its contention that its original showing did not intentionally misrepresent facts, Wolverine submits as an exhibit a new map which shows that its initial proposal covers even less of the city of Midland than that depicted by petitioner, who, Wolverine asserts, also erroneously relied on an obsolete map because of the rapid changes in Midland's corporate boundaries. The Board is satisfied, based on an examination of all the pleadings, that the allegations submitted by Patten do not raise a substantial question of misrepresentation and that the erroneous information initially submitted by Wolverine was no more than an innocent error.

9. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed February 13, 1974, by the Patten Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*